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## ***CITY OF MISSOULA v. KROSCHER: MISSING THE MARK ON MONTANA'S TERRY STATUTE***

**Kirsi Luther\***

### I. INTRODUCTION

In *City of Missoula v. Kroschel*,<sup>1</sup> the Montana Supreme Court had the opportunity to define the parameters of a lawful stop under Montana's *Terry* statute.<sup>2</sup> After twenty-year-old Marcy Kroschel was questioned and detained by campus police for more than an hour upon suspicion that she was a minor in possession of alcohol, Kroschel raised a statutory and constitutional challenge to the officers' conduct.<sup>3</sup> The Court unanimously concluded that she was subject to a custodial interrogation and never given a *Miranda* warning.<sup>4</sup> However, the interesting statutory question went relatively unaddressed.

This note argues that the Court wrongly decided the issue of whether Officer Parsons' initial conduct violated the governing statute. By resolving the case on the *Miranda* issue, the Court failed to provide meaningful interpretive guidance<sup>5</sup> to a statute that provides Montanans with an important right: the right of a nondriver, briefly detained during an investigatory stop, to decline to answer an officer's questioning free of consequence. Because this note focuses primarily on the statutory question, my analysis will leave the constitutional issues largely unaddressed. Nevertheless, because the Court's resolution of the statute raises constitutional implications, Part II will begin with a brief discussion of the legal backdrop surrounding noncustodial police encounters. It will then discuss stop-and-identify statutes and the Montana legislature's decision to enact its *Terry* statute. Part III will discuss the Court's opinion in *City of Missoula v. Kroschel*. Part IV will infer a reading of the statute from the Court's opinion, pose a critique of

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\* Law clerk, United States District Court. This note began as a project for Professor Anthony Johnstone's Legislation course. I would like to thank Professor Johnstone and the staff and editors of the Montana Law Review for their assistance.

1. 419 P.3d 1208 (Mont. 2018).

2. MONT. CODE ANN. § 46-5-401 (2015).

3. *Kroschel*, 419 P.3d at 1213-14.

4. *Id.* at 1225; *Kroschel*, 419 P.3d at 1226 (Gustafson, J., concurring in part, dissenting in part).

5. Appellant's Op. Br., *City of Missoula v. Kroschel*, 2017 WL 2692832, at 12 n.2 (Mont. 2017) (No. DA 17-0184). In asking the Court for clarity on the statute, counsel for appellant explained that "ASUM Legal Services has many cases every year with seminal non-vehicular investigatory stop issues. However, the requirements of [the *Terry* statute] and *Driscoll* are often brushed off by lower courts, as in this case, because this area of the law is relatively undeveloped."

that reading, and then propose an alternate analysis of Montana's *Terry* statute.

## II. BACKDROP

### A. *The Federal Standard*

The Fourth Amendment to the United States Constitution provides “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”<sup>6</sup> A search or seizure effectuated without a warrant is per se unreasonable, subject to a few “specifically established and well delineated exceptions.”<sup>7</sup> One longstanding warrant exception permits an officer to arrest an individual when the officer has probable cause to believe that person has committed a crime.<sup>8</sup> *Terry v. Ohio*<sup>9</sup> addressed the constitutionality of warrantless noncustodial police encounters and held that the Fourth Amendment permits an officer to briefly detain a person when the officer has a reasonable suspicion that “criminal activity is afoot.”<sup>10</sup>

Once validly stopped, an officer has wide latitude to question a suspect. For example, the Fourth Amendment is not violated where an officer asks questions that are unrelated to those reasons justifying the stop.<sup>11</sup> While the Supreme Court has never squarely held that an officer may demand a person's driver's license and various papers in the context of a traffic stop, it appears to permit this practice<sup>12</sup> and circuit courts have found it constitutional.<sup>13</sup>

While the Fourth Amendment allows officers to freely ask questions during a routine stop, in *Hibel v. Sixth Judicial District of Nevada*<sup>14</sup> the Court addressed whether a state can criminalize a person's failure to answer. After witnessing a domestic dispute, a concerned citizen called the Humboldt County Sheriff's Department to report the incident.<sup>15</sup> An officer dispatched to the scene observed a man standing outside of a truck that

6. U.S. CONST. amend. IV.

7. *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993).

8. *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

9. 392 U.S. 1, 22–23, 27 (1968).

10. *Arizona v. Johnson*, 555 U.S. 323, 330 (2009).

11. *Id.* at 333.

12. *Id.* at 327 (quoting *Brendlin v. California*, 551 U.S. 249, 255 (2007) (holding that traffic stops are seizures)); *see also* *Delaware v. Prouse*, 440 U.S. 648, 659 (1979) (noting that during routine traffic stops “licenses and registration papers are subject to inspection”).

13. *United States v. Shabazz*, 993 F.2d 431, 437 (5th Cir. 1993); *United States v. Holt*, 264 F.3d 1215, 1221 (10th Cir. 2001), *overruled on non-relevant grounds by* *United States v. Stewart*, 473 F.3d 1265 (10th Cir. 2007).

14. 542 U.S. 177 (2004).

15. *Id.* at 180.

matched the description provided by the caller.<sup>16</sup> The man, later identified as Larry Dudley Hiibel, appeared intoxicated.<sup>17</sup> The officer approached, explained the reported disturbance, and asked Hiibel to produce identification.<sup>18</sup> Hiibel refused.<sup>19</sup> Over the course of the encounter, the officer asked Hiibel to produce identification no less than eleven times, and each time Hiibel refused.<sup>20</sup> Eventually, the officer arrested Hiibel under a Nevada statute that requires a person to identify his or herself when lawfully stopped by a peace officer.<sup>21</sup> Hiibel was convicted and ultimately appealed to the United States Supreme Court.<sup>22</sup>

*Hiibel* addressed the constitutionality of so-called “stop-and-identify” statutes. The Court noted that many states, including Montana, have enacted statutes similar to Nevada.<sup>23</sup> Commonly, stop-and-identify statutes “combine elements of traditional vagrancy laws with provisions intended to regulate police behavior” in the course of the stop.<sup>24</sup> All stop-and-identify statutes permit an officer to ask for a suspect’s name or require a suspect to disclose his or her identity.<sup>25</sup> The Court noted that numerous states have adopted the Model Penal Code’s Uniform Arrest Act with language that allows an officer to “demand [the suspect’s] name, address, business abroad and whither he is going.”<sup>26</sup>

Noting the constitutional limitations that constrain stop-and-identify statutes—for example, such statutes must clearly target specific criminal conduct<sup>27</sup> and not vest the officer with ultimate discretion to decide whether an individual has complied with the statute’s terms<sup>28</sup>—the Court upheld Nevada’s statute because it was “narrow and more precise.”<sup>29</sup> As opposed to the unconstitutional statute in *Kolender v. Lawson*,<sup>30</sup> which required a suspect to provide a “credible and reliable” means of identification, the

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16. *Id.*

17. *Id.* at 180–81.

18. *Id.*

19. *Id.* at 181.

20. *Hiibel*, 542 U.S. at 181.

21. *Id.*; Nev. Rev. Stat. (NRS) § 171.123 (2003) (providing that: “Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime . . . The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer”).

22. *Hiibel*, 542 U.S. at 182.

23. *Id.*

24. *Id.* at 183.

25. *Id.*

26. *Id.*

27. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

28. *Kolender v. Lawson*, 461 U.S. 352 (1983).

29. *Hiibel*, 542 U.S. at 184.

30. 461 U.S. 352 (1983).

Court noted that Nevada’s statute only required a suspect to disclose his or her name and did not require the suspect to provide the officer with “a driver’s license or any other document.”<sup>31</sup> It further explained, “[p]rovided that the suspect either states his name or communicates it to the officer by other means [*i.e.*, voluntarily providing the officer with a driver’s license]—a choice, we assume, that the suspect may make—the statute is satisfied and no violation occurs.”<sup>32</sup>

The Supreme Court went on to note that the Nevada law was not inconsistent with the Fourth Amendment because “asking questions is an essential part of police investigations” and “a suspect’s identity is a routine and accepted part of many *Terry* stops.”<sup>33</sup> The Court recognized that the request for a suspect’s name is directly related “to the purpose, rationale, and practical demands of a *Terry* stop.”<sup>34</sup> The statute serves a legitimate government interest because “[t]he threat of criminal sanction helps ensure that the request for identity does not become a legal nullity.”<sup>35</sup> Because the statute served important governmental interests, such as stopping crime and identifying dangerous persons, and did not change the nature or purpose of the stop itself, the Court concluded that the narrow scope of the statute did not offend the Fourth Amendment.<sup>36</sup>

The Court then addressed whether the statute violated *Hiibel*’s right against self-incrimination and held that the Fifth Amendment was not violated where a person’s refusal to disclose his or her name was not based on a real or appreciable fear of incrimination.<sup>37</sup> However, the Court left open the question of whether a different outcome was required when “furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense.”<sup>38</sup>

### B. *The Montana Standard*

Montana has codified its search and seizure law, which mirrors the federal *Terry* standard and contains a stop-and-identify component:<sup>39</sup>

(2) A peace officer who has lawfully stopped a person or vehicle under this section may:

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31. *Hiibel*, 542 U.S. at 184–85.

32. *Id.* at 185.

33. *Id.* at 185–86.

34. *Id.* at 178.

35. *Id.* at 188.

36. *Id.*

37. *Hiibel*, 542 U.S. at 190.

38. *Id.* at 191.

39. MONT. CODE ANN. § 46–5–401 (2017).

(a) Request the person's name and present address and an explanation of the person's actions and, if the person is the driver of a vehicle, demand the person's driver's license and the vehicle's registration and proof of insurance[.]<sup>40</sup>

Originally passed in 1972, the statute was significantly amended in 2003 after the Montana Supreme Court's decision in *State v. Krause*.<sup>41</sup> *Krause*, the 2003 legislative history, and the Court's 2013 decision in *State v. Driscoll*<sup>42</sup> provide helpful context for interpreting the statute's meaning today.

### I. State v. Krause

*Krause* held that an officer violated a statutory command under then-in-force § 46-5-402(4) when he failed to provide a “mini-Miranda” warning during an otherwise valid stop.<sup>43</sup> In *Krause*, an officer was called to a private residence after its homeowners observed a stranger parked in their driveway.<sup>44</sup> When the officer arrived, he found Krause asleep behind the wheel.<sup>45</sup> After smelling alcohol on his breath, the officer questioned Krause about his drinking and Krause admitted to having a few.<sup>46</sup> The officer then asked Krause to step out of the vehicle and perform a field sobriety test, which he failed.<sup>47</sup> The officer never identified himself, nor did he inform Krause that he was not under arrest during the officer's initial questioning.<sup>48</sup> The officer also never frisked Krause.<sup>49</sup>

On appeal, Krause argued that the officer failed to comply with Montana's then-in-force investigatory statute which read:

**Stop and frisk.** A peace officer who has lawfully stopped a person under 46-5-401 or this section: . . .

(3) may demand the name and present address of the person; and

(4) shall inform the person, as promptly as possible under the circumstances and in any case before questioning the person, that the officer is a peace officer, that the stop is not an arrest but rather a temporary detention for an investigation, and that upon completion of the investigation, the person will be released if not arrested.<sup>50</sup>

40. *Id.* at (2)(a).

41. 44 P.3d 493 (Mont. 2002).

42. 303 P.3d 788 (Mont. 2013).

43. *Krause*, 44 P.3d at 498.

44. *Id.* at 494.

45. *Id.*

46. *Id.* at 494-95.

47. *Id.* at 495.

48. *Id.* at 494-95.

49. *Krause*, 44 P.3d at 494-95.

50. *Id.* at 497-98 (citing Mont. Code Ann. § 46-5-402 (2001) *repealed by* Mont. Code Ann. 46-5-401 (2003)).

The State argued that the “mini-*Miranda* warning”<sup>51</sup> in subsection (4) applied only when an individual was frisked, and therefore was not required.<sup>52</sup> Additionally, the State argued that the officer stopped Krause pursuant to an “investigatory stop” as opposed to a “stop and frisk” which were separately codified, and therefore requirements of the latter should not be imputed to the former.<sup>53</sup> Justice Nelson, writing for the majority, rejected both contentions.<sup>54</sup> First, he noted that the prefatory language in § 46-5-402 included § 46-5-401 within its scope (“a peace officer who has lawfully stopped a person *under 46-5-401* or this section”).<sup>55</sup> Then he noted that nothing in this statute provided that the “mini-*Miranda* warning” be limited to an officer’s frisk.<sup>56</sup> Even though Justice Nelson observed that the legislature had likely not intended this outcome, the Court noted that its duty was simply to interpret the language before it.<sup>57</sup>

## 2. House Bill 40

During the legislative session following *Krause*, at the behest of the Justice Department, Butte Representative Brad Newman introduced House Bill 40 entitled “Clarify Stop-and-Frisk Law.”<sup>58</sup> The bill proposed to repeal § 46-5-402 and amend § 46-5-401 to provide all requirements governing stop and frisk into a single statute.<sup>59</sup> Additionally, the draft entirely removed the “mini-*Miranda*” component.<sup>60</sup> Representative Newman reasoned such warnings were a matter of best practices, but argued that these warnings should not be mandated by statute nor should the failure to give a “mini-*Miranda*” be grounds for suppression where it is not constitutionally required.<sup>61</sup> The statute proposed by Representative Newman borrowed the language from § 46-5-402(3), which provided that an officer may “demand the name and present address of the person,” but added “and an explanation of the person’s actions.”<sup>62</sup>

51. See H.R. Judiciary Comm., Comm. Minutes January 20, 58th Leg. Reg. Sess. 11 (Mont. 2003) (testimony by proponent Leo Gallagher, then County Attorney for Lewis and Clark County (referring to subsection four as a mini-*Miranda*)).

52. *Krause*, 44 P.3d at 497.

53. *Id.* at 497-98.

54. *Id.* at 498.

55. *Id.* (emphasis added).

56. *Id.*

57. *Id.*

58. History and Final Status of Bills and Resolutions of the Senate and House of Representatives of the State of Montana, 58th Leg. Reg. Sess. 226 (Mont. 2003).

59. House Bill 40, 58th Leg. Reg. Sess. (Mont. 2003) (As Introduced in House).

60. *Id.*

61. S. Judiciary Comm., Comm. Minutes March 11, 58th Leg. Reg. Sess. 12 (Mont. 2003).

62. See House Bill 40, 58th Leg. Reg. Sess. (Mont. 2003) (As Introduced in House).

In committee, Representative Christopher Harris raised concern over the word “demand,” and asked whether a person could refuse to answer or whether that would trigger an arrest.<sup>63</sup> Colonel Shawn Driscoll of the Montana Highway Patrol, a proponent of the bill, responded that under the current law, a person’s failure to answer an officer’s question could *already* give rise to a charge of obstructing justice.<sup>64</sup>

At the bill’s committee hearing on January 20, 2003, this issue was raised by Representatives Diane Rice and Jim Shockley. Representative Rice believed that it was problematic to allow an officer to demand certain information where a person receives no warning of her Fifth Amendment right against self-incrimination.<sup>65</sup> Representative Shockley similarly aired concern that the Fifth Amendment’s protections lose all teeth if a person may be charged with obstructing justice for failing to answer an officer’s questions.<sup>66</sup> He noted that the language “‘may demand’ . . . does not give a guy a lot of latitude to refuse.”<sup>67</sup>

Although the bill passed out of committee 13 to 5, concerns remained.<sup>68</sup> While the bill was sent to the Senate Judiciary committee largely as introduced, these same issues were echoed in subsequent hearings.<sup>69</sup> On March 12, the bill was indefinitely tabled.<sup>70</sup> Then, only a week later, the bill was set for a committee meeting where it was amended to reflect that an officer may “request” but not “demand” “a person’s name, age, and explanation of the person’s actions.”<sup>71</sup> With only minor punctuation changes, the bill left committee, passed the Senate 48 to 0, passed a House vote 99 to 1, and was ultimately signed into law by the governor on April 15, 2003.<sup>72</sup>

### 3. State v. Driscoll

The Montana Supreme Court conducted an analysis of § 46–5–401 for the first time in *State v. Driscoll*. In *Driscoll*, two officers were patrolling the annual Dillon rodeo and observed Dominic Driscoll in a bar holding a

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63. H.R. Judiciary Comm., Comm. Minutes January 20, 58th Leg. Reg. Sess. 12 (Mont. 2003).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. See History and Final Status of Bills and Resolutions of the Senate and House of Representatives of the State of Montana, 58th Leg. Reg. Sess. 226 (Mont. 2003).

69. S. Judiciary Comm., Comm. Minutes March 11, 58th Leg. Reg. Sess. 13-17 (Mont. 2003).

70. History and Final Status of Bills and Resolutions of the Senate and House of Representatives of the State of Montana, 58th Leg. Reg. Sess. 226 (Mont. 2003).

71. S. Judiciary Comm., Comm. Minutes March 12, 58th Leg. Reg. Sess. 2 (Mont. 2003).

72. History and Final Status of Bills and Resolutions of the Senate and House of Representatives of the State of Montana, 58th Leg. Reg. Sess. 226 (Mont. 2003); Second and Third Reading Votes of Bills and Resolutions of the Senate and House of Representatives of the State of Montana Volume I, 58th Leg. Reg. Sess. 53–54 (Mont. 2003).



can of beer. Because he looked young, the officers approached and asked how old he was. Driscoll stated that he was twenty-two. The officers asked to see identification and he refused. The officers then told Driscoll to accompany them outside. There, he was asked to provide his full name and his date of birth. Driscoll responded with a false name and birthdate. When dispatch was unable to confirm this information, Driscoll was placed under arrest. Charged with a minor in possession of alcohol and obstructing justice, Driscoll moved to suppress his statements.<sup>73</sup>

Turning to the language of the statute, the Court first concluded that Driscoll was properly stopped and properly asked his age.<sup>74</sup> Next, the Court considered whether the scope of the investigation was improperly expanded when the officers took Driscoll outside.<sup>75</sup> Noting that “the officers approached Driscoll and asked for his age and an ID, rather than for his name, address, or an explanation for his actions” (which could be read to indicate that the Court was troubled that the request itself exceeded the scope of the statute), the Court concluded that it was the officers’ decision to take Driscoll outside *absent any additional particularized suspicion* that Driscoll was obstructing justice that resulted in an impermissible expansion of the stop.<sup>76</sup> The Court concluded that the officers’ conduct violated the *Terry* statute.<sup>77</sup>

### III. THE COURT’S DECISION IN *CITY OF MISSOULA V. KROSCHEL*

In August of 2015, Marcy Kroschel and her friend Kaitlynn O’Connell were attending a college football game when Officer Shannon Parsons, a university police officer, observed Kroschel walking arm-in-arm with O’Connell and leaning on her for support.<sup>78</sup> Suspecting the two of drinking underage, Officer Parsons approached and smelled alcohol on Kroschel’s breath.<sup>79</sup> The officer asked both women to produce identification.<sup>80</sup> O’Connell, who was twenty-one, immediately handed over her driver’s license.<sup>81</sup> Kroschel told Officer Parsons she did not have identification on her because it was in her stadium seat.<sup>82</sup> Officer Parsons then asked Kroschel for her college identification number.<sup>83</sup> Kroschel claimed that she was no

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73. 303 P.3d 788, 789 (Mont. 2013).

74. *Id.*

75. *Id.* at 790.

76. *Id.*

77. *Id.* 789–90.

78. *City of Missoula v. Kroschel*, 419 P.3d 1208, 1213 (Mont. 2018).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

longer a student and could not recall it.<sup>84</sup> Officer Parsons continued to press, asking Kroschel for her name and her date of birth so that she could run a check for her driver's license through the Criminal Justice Information Network database.<sup>85</sup> Kroschel then furnished the officer with a false name and birthdate.<sup>86</sup> The false information returned no results.<sup>87</sup> Twice more Officer Parsons asked Kroschel for her correct name and date of birth.<sup>88</sup>

When Kroschel's response did not satisfy Officer Parsons, the officer told Kroschel that she could be arrested for obstructing justice.<sup>89</sup> She also threatened to take Kroschel into the station so they could determine her identity there.<sup>90</sup> Kroschel began crying, and stated that she did not want to go to the station.<sup>91</sup> She attempted to leave but Officer Parsons physically stopped her from doing so.<sup>92</sup> Kroschel was "crying, scared, and repeatedly told the officer that she did not want to go with her."<sup>93</sup> Officer Parsons continued to press and asked Kroschel for her name and birthdate at least five times during this initial encounter.<sup>94</sup> Wanting to get Kroschel in a private place "to protect her privacy and perhaps even her modesty,"<sup>95</sup> Officer Parsons led Kroschel by her arm into the basement of the stadium.<sup>96</sup>

There, Kroschel and Officer Parsons encountered another campus police officer, Detective Chris Croft.<sup>97</sup> Detective Croft "subjected Kroschel to a second round of questioning" to obtain her real name and date of birth. Officer Parsons ordered O'Connell away and the two officers escorted Kroschel into a small room under the stairs. Kroschel, who had up until this point insisted that she had already provided officers with her correct information, finally wore down and revealed the true spelling of her name and

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84. *Kroschel*, 419 P.3d at 1213.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1213–14.

89. *Id.* 1214.

90. *Kroschel*, 419 P.3d at 1214.

91. *Id.*

92. *Id.*

93. *Id.*

94. Appellant's Op. Br., *City of Missoula v. Kroschel*, 2017 WL 2692832, 3 (Mont. 2017).

95. Appellee's Br., *City of Missoula v. Kroschel*, 2017 WL 2692832, 24 (Mont. 2017). The State's brief provides an odd justification for Officer Parsons' expansion of the *Terry* stop. It explains, "Parsons asked Kroschel to come to a quieter and more private area not to make Kroschel feel uncomfortable, but to remove her from a loud stadium, protect her privacy and perhaps even her modesty since, the State supposes, public drunkenness is not widely regarded as socially acceptable behavior."

96. *Kroschel*, 419 P.3d at 1214.

97. *Id.*

an underage birthdate. Kroschel was then charged with a minor in possession of alcohol and obstructing justice.<sup>98</sup>

In Municipal Court, Kroschel moved to suppress the evidence under both Federal and Montana Constitutions and § 46–5–401. Kroschel also argued that her Fifth Amendment rights were violated when she was subjected to a custodial interrogation without a *Miranda* warning. Kroschel lost her motion, was convicted, and lost again on appeal to the district court.<sup>99</sup> Kroschel then appealed to the Montana Supreme Court.<sup>100</sup>

The majority opinion, written by Justice Sandefur, first noted that Officer Parsons' initial stop was valid.<sup>101</sup> However, for a stop to continue to be valid, its "duration and scope . . . must be carefully limited to its 'underlying justification.'" <sup>102</sup> Citing *Hiibel*, the majority observed that "asking questions is an essential part of police investigations," and consistent with that purpose, it is not unconstitutional for states to require compliance with an officer's request for information.<sup>103</sup> Though subsection (a) of the statute indicates that an officer may "request a person's name, current address, and an explanation" of the person's conduct, the majority noted that "nothing in the language or legislative history . . . indicates any legislative intent to preclude police from asking other questions permissible under the Fourth Amendment within the limited scope of the stop (*i.e.*, reasonably related in scope to the particularized suspicion that justified the stop)."<sup>104</sup> It then stated: "If not the functional or substantive equivalent of requesting a person's name and current address, demanding available proof of identification is typically likewise reasonably related to the purpose of an investigative stop for Fourth Amendment purposes."<sup>105</sup> The majority distinguished its decision from *Driscoll* by concluding that here, unlike there, Officer Parsons had particularized suspicion that Kroschel was lying *before* she expanded the scope of the stop by bringing Kroschel downstairs.<sup>106</sup> Because the Court found that Kroschel was eventually arrested and interrogated, the

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Kroschel*, 419 P.3d at 1216.

103. *Id.* at 1216–17.

104. *Id.* at 1217.

105. *Id.* The majority cites to *Hiibel* for the proposition that "demanding available proof of identification" is likewise related to the reasons justifying a stop. *Hiibel* is clear that an officer may demand identification (where doing so is reasonably related to the reasons justifying the stop) and the Fourth Amendment is not violated where an individual chooses to respond to such a demand by offering *proof* of identification (like a driver's license). Reading *Hiibel* to permit an officer to demand proof of identification misses what *Hiibel* crafts as a careful distinction between permissible and impermissible police practices.

106. *Id.* at 1218–19.

Court never addressed whether Officer Parsons' demand for a name and date of birth violated the Fifth Amendment where "furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense."<sup>107</sup>

Justice Gustafson's special concurrence dissented on the first question.<sup>108</sup> Joined by Justice Shea and Judge Elizabeth Best (sitting in lieu of Justice McKinnon), Justice Gustafson noted that the majority drew no distinction between Officer Parsons' request for a date of birth and the conduct permitted by the statute (name, address, and explanation), and believed that the officer's request was incriminating because Kroschel's age was an element of the offense suspected.<sup>109</sup> Though Justice Gustafson did not cite *Hiibel*, it is reasonable to assume that she would have concluded that this conduct violated both statutory and constitutional constraints. Justice Shea wrote separately, observing that because the Court ultimately resolved the question on Fifth Amendment grounds, the majority's entire analysis of the initial stop is dicta or possibly an advisory opinion.<sup>110</sup>

#### IV. ANALYSIS OF MONTANA'S TERRY STATUTE

Though the questions raised by the dissenting Justices are interesting, this note focuses primarily on the Court's resolution of the statutory question. I begin with an assumption that Montana's *Terry* statute does not merely codify the Fourth Amendment. I hold this assumption because, as explained more fully below, the text of the statute constrains officers beyond what is required by federal constitutional law. I recognize the speculative nature of analyzing the *Kroschel* opinion from a statutory perspective as the Court addressed the statute in only two or three sentences of its opinion.

Nevertheless, it is my belief that after the Court concluded that there was no Fourth Amendment nor Article II, § 11 violation, the question became purely statutory; did the officers' conduct violate Montana's *Terry* statute? Answering this question required an analysis of two issues. First, what did the legislature mean when it authorized an officer to "request" certain information rather than "demand" it; can a person decline to answer free of consequence? Second, what limitations, if any, does the list of enumerated questions (name, address, and explanation of a person's actions)

107. *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 191 (2004).

108. *Kroschel*, 419 P.3d at 1225–26 (Gustafson, J., concurring in part, dissenting in part).

109. *Id.* at 1226 n.1. Specifically, Justice Gustafson noted: "The majority fails to recognize requesting a date of birth is not within the information an officer may request under § 46–5–401(2)(a) . . . (allowing a peace officer to "request the person's name and present address and an explanation of the person's actions")."

110. *Id.* at 1228–29 (Shea, J., concurring in part, dissenting in part).

place upon the scope of permissible officer questioning; are these the only questions an officer is permitted to ask?

A. *The meaning of “request”*

The Court never analyzed the meaning of “request” in the context of the statute. However, the Court concluded that Officer Parsons’ conduct did not violate the statute. Working backwards, we can glean some textual meaning from the Court’s resolution on the facts.

Officer Parsons was persistent in her pursuit to determine Kroschel’s true identity; the encounter lasted close to an hour. When Kroschel attempted to leave, Officer Parsons physically stopped her from doing so. Officer Parsons was resourceful; when Kroschel declined to volunteer her identity, the officer attempted to get it by asking for her school identification number, her cell phone number, and her parent’s cell phone numbers. Significantly, there was no violation of the statute where Officer Parsons advised Kroschel that her failure to answer truthfully could, and did, result in an obstruction of justice charge. These facts would seem to negate an interpretation that the word “request” permits an individual to decline to answer an officer’s “request” free of consequence. This may be a good rule as matter of policy—*Hiibel* found that an officer’s ability to reliably identify suspects in the field is essential to good police work—however, it is problematic as a matter of statutory interpretation.

First, it is a principle of statutory interpretation that where a different word is used in the same document, it is presumed to have a different meaning.<sup>111</sup> Here, the statute uses both words “request” and “demand.” The statute authorizes an officer to “request” certain information (a name, address, and an explanation) from nondrivers<sup>112</sup> and to “demand” certain information (a driver’s license, vehicle’s registration, and proof of insurance) from drivers.<sup>113</sup> This variance in usage indicates that the legislature intended the word “request” to convey a different meaning than the word “demand.”

It is another principle of statutory interpretation that a court should interpret a word by its ordinary and nontechnical meaning, unless it is clear that another meaning is intended.<sup>114</sup> To decipher ordinary meaning, courts often look to dictionaries.<sup>115</sup> Here, for example, Black’s Law Dictionary

111. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 170 (2012).

112. MONT. CODE ANN. § 46–5–401(2)(a).

113. *Id.*

114. SCALIA, *supra* note 111, at 69.

115. See, e.g., *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011) (defining the word “license”); *Crawford v. Metro Gov’t of Nashville & Davidson Co.*, 555 U.S. 271 (2009) (defining the word “oppose”).

defines a “request” as “[a] motion by which a member invokes a right, seeks permission for the exercise of a privilege, or asks a question,”<sup>116</sup> whereas a “demand” is “[t]he assertion of a legal or procedural right.”<sup>117</sup> A broader survey of dictionaries reveals a common theme: a “demand” occurs when compliance is justified by law, whereas a “request” asks another to do something under circumstances where they may decline.<sup>118</sup> Additionally, and to a lesser degree, “request” and “demand” are interpreted to convey a tonal difference distinguished by the force of the verbal order, i.e., a request is phrased softly or with greater civility than a demand. As a rule of law, it is difficult to imagine that the legislature meant to prevent officers from soliciting certain information from nondrivers in an overly strong manner. It is even harder to imagine that any court would be willing to suppress evidence on this basis, as Montana courts construe purely statutory violations as grounds for suppression.<sup>119</sup> Rejecting this notion, *Kroschel* indicates that Montana courts should construe the word “request” to have the same operative force as a “demand” despite the clear textual delineation in the statute.

So, if the words “request” and “demand” are synonyms in Montana’s *Terry* statute, a problem arises as the statute authorizes an officer to “request . . . an explanation of the person’s actions.” The Fifth Amendment protects an individual from being compelled to provide incriminating information, and interpreting the statute to permit an officer to charge an individual with obstructing justice for failing to provide such an explanation exceeds the scope authorized in *Hiibel* and would seem to render the statute unconstitutional as interpreted.

116. *Request*, BLACK’S LAW DICTIONARY, 1497 (10th ed. 2014).

117. *Demand*, BLACK’S LAW DICTIONARY, 522 (10th ed. 2014).

118. See WHARTON’S LAW LEXICON 2754, 742 (13th ed. 1925) (defining demand as “a claim, a challenging, the asking of anything with authority, a calling upon a person for anything due,” and compare with “request-notes: applications to obtain a permit for removing excisable articles,” (there is no definition for request in-and-of itself)); BALLENTINE’S LAW DICTIONARY 330,1098 (3d ed. 1969) (defining demand as “a claim; a legal obligation; a request to perform an alleged obligation; a written statement of a claim . . . a requisition or request under a claim of right . . . the assertion of a right to recover a sum of money from the person upon who the demand is made.” *Id.* at 330 (internal citations omitted)). Whereas a “request” is “[t]o ask or express a wish for something . . . [s]ometimes to direct or command, although in a delicate manner. In other words, a precatory word, subject to construction in a proper case a mandatory term.” *Id.* at 1098 (internal citations omitted)); WILLIAM C. BURTON, LEGAL THESAURUS 148, 448 (1980) (“request” the verb is similar to “abjure, appeal, apply for, ask for, beckon, beg for, beseech, bid, cadge, call for, canvass, claim, clamor for, command, cry for, demand, desire, dun, enjoin, entreat, exact, impetrate, *implorare*, implore, importune, invite, make application, mendicate, nag, *obsecrare*, obtest, order, petition, petition for, plead for, pray for, pray, put in for, require, requisition, *rogare*, seek, send for, solicit, sue for, summon, supplicate, urge, want.” *Id.* at 448 (emphasis added)). Whereas a “demand” is akin to “arrogate, ask for with authority, assert a right to, assert one’s rights, call for, claim, claim as one’s due, command, direct, enjoin, exact, give notice, impose, insist, make application, order, present one’s claim, press, request, require, urge.” *Id.* at 148 (emphasis added)).

119. See, e.g., *State v. Driscoll*, 303 P.3d 788 (Mont. 2013); *State v. Bauer*, 36 P.3d 892, 897 (Mont. 2001); *State v. Krause*, 44 P.3d 493 (Mont. 2002).

Perhaps the statute can be saved from such an interpretation by applying the substantive canon against constitutional doubt. This canon simply instructs a court to avoid adopting an interpretation that places a statute's constitutionality in question.<sup>120</sup> Here, the statute could be interpreted to give the word "request" more bite as it applies to the "request" for a person's "name and address" than to an "explanation of the person's actions." However, such an interpretation is not without fault as it violates the maxim that "words or phrases are presumed to bear the same meaning throughout a text."<sup>121</sup> Textually speaking, I do not think there is a way to square the Court's conclusion that Officer Parsons' conduct did not violate the statute with a principled interpretation of the statute or risk placing its constitutionality in doubt on self-incrimination grounds.

### B. The enumerated list

The second issue raised by the statute is what significance the legislature intended by specifically enumerating a list of questions an officer may ask of a nondriver who is lawfully stopped. Recall that the limitation does not derive from the Fourth Amendment, which generally permits an officer wide latitude to question a suspect.<sup>122</sup> The doctrine of *expressio unius* (also called the negative implication rule) captures the idea that the "expression (or inclusion) of one thing indicates exclusion of the other."<sup>123</sup> Courts applying this doctrine will often find that where the legislature specifically enumerates a list, it does not intend to include those items not listed.<sup>124</sup> However, this canon ought to be used in a normative context. For example,

If Mother tells Sally, "Don't hit, kick, or bite your sister Anne," Sally is *not* authorized by *expressio unius* to "pinch" her little sister. The reason is that the normative baseline (discerned from prior practice or just family culture) is "no harming sister," and the directive was an expression of that baseline that ought not be narrowly limited.<sup>125</sup>

Here, the statute *can* be read to mean that the legislature's specific inclusion of a "name, address, and explanation . . ." excludes the officer from asking any other questions. This was the conclusion reached by Jus-

120. SCALIA, *supra* note 111, at 247; *see also* United States ex rel. Att'y Gen. v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.>").

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121. SCALIA, *supra* note 111, at 170; *see also* United States v. Fisher, 6 U.S. (2 Cranch) 358, 388–97 (1805).

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122. *See* Arizona v. Johnson, 555 U.S. 323, 333 (2009).

123. WILLIAM N. ESKRIDGE, et. al., LEGISLATION & REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 668 (5th ed. 2014).

124. *See* Tate v. Ogg, 195 S.E. 496 (Va. 1938) (where the legislature included "any horse, mule, cattle, hog, sheep or goat" the court found that it did not include turkeys).

125. ESKRIDGE, *supra* note 123, at 669.

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tice Gustafson, and is arguably supported by *Driscoll*, which seemed to take some issue with the fact that the officer had asked for Driscoll's "age and an ID, rather than for his name, address, or an explanation for his actions."<sup>126</sup> However, *Driscoll* found a different violation of the statute—that the officer had improperly expanded the investigation by taking Driscoll outside, not by asking unenumerated questions.<sup>127</sup> Normatively speaking, it could be that *Driscoll* stands for the proposition that where an officer suspects someone of being a minor in possession of alcohol, the request for one's age is included within the request for an "explanation of the person's actions" in the same way that the example above prohibits pinching even though it does not expressly say so. By the same token, the majority may be correct that asking for various forms of proof of identification is the "functional . . . equivalent" of asking for a person's name, and *Hiibel* would not prohibit this practice where it is clear that handing over one's driver's license is a courtesy.

If we assume it is improper to construe the statute as playing no limiting role, but to permit officers to ask the enumerated questions and questions reasonably akin to the enumerated questions, did Officer Parsons exceed the scope of the statute by requesting Kroschel's phone number; is that the "functional . . . equivalent" of her name? What about the request for Kroschel's parent's cell phone numbers?<sup>128</sup>

In examining the limiting role of the list, the Court reasoned that there was no indication from the legislative history that the legislature meant to limit an officer's ability to question. Looking to legislative history is a common, though not uncontroversial,<sup>129</sup> tool of statutory interpretation. However, not all forms of legislative history should be given equal weight.<sup>130</sup> The Court's use of legislative history here, that legislative absence is indicative of meaning, is the least compelling form of this evidence.<sup>131</sup> It is often referred to as the "Dog that Doesn't Bark" canon and conveys a presumption that because significant changes are unlikely to go unmentioned, where no changes are discussed, none are presumed.<sup>132</sup> However, reliance on evi-

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126. *State v. Driscoll*, 303 P.3d 788, 790 (Mont. 2013).

127. *Id.*

128. Appellant's Op. Br., *City of Missoula v. Kroschel*, 2017 WL 2692832, 15 (Mont. 2017).

129. See *Samantar v. Yousuf*, 560 U.S. 305 (2010) (Scalia, J., concurring) (expressing the belief that where the textual evidence indicates a clear result, a court should not delve into legislative history where it "serves no purpose except needlessly to inject into the opinion a mode of analysis that not all of the Justices consider valid"); but see B.J. Ard, Comment, *Legislative Drafting Manuals as a Guide to Statutory Interpretation*, 120 *YALE L. J.* 185 (2010) (arguing that reliance on a text's history is not antithetical to a textualist method of interpretation).

130. *ESKRIDGE*, *supra* note 123, at 693.

131. *Id.* at 829.

132. See *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991); *Montana Wilderness Assoc. v. U.S. Forest Serv.*, No. 80-3374, *withdrawn and replaced by* 655 F.2d 951, 953 (9th Cir. 1981).



dence of absence to rebut the textualist presumption that the legislature intends the words it chooses is improper.

Practically speaking, it is more likely that the legislative history of HB 40 contained no discussion of the limiting effect of the list not because it did not intend *any* limiting effect, but because the changes made to this part of the statute during the 2003 legislative session were relatively insignificant and took a backseat to the discussions surrounding removal of the mini-*Miranda* warning and the concern generated over the word “demand.” When the legislature discussed HB 40, it borrowed from then-in-force § 46–5–402 which authorized an officer to request the name and address of a nondriver. The legislature then added the explanation-of-a-person’s-actions language, which was likely borrowed from the Model Penal Code’s Uniform Arrest Act.

As an aside, the Court is likely correct that extrinsic evidence supports the conclusion that this list was not intended to be exhaustive or strictly interpreted, but there is a better source for this assertion. The language in the statute now enacted closely tracks language provided in the Model Penal Code’s Uniform Arrest Act of 1942.<sup>133</sup> The model statute specified that where an officer has reasonable suspicion, the officer may “stop any person abroad . . . and may demand of him his name, address, business abroad and whither he is going.”<sup>134</sup> This provision was designed as a statutory remedy for a right that was not well recognized at the time: the right of the police to detain and question a suspect pre-arrest.<sup>135</sup>

### C. A proposed interpretation of Montana’s Terry statute

Because the Court largely side-stepped the statutory analysis, *City of Missoula v. Kroschel* remains a missed opportunity to provide lower courts with necessary interpretation of a statute that provides Montanans with an important right. For this reason, I will propose what I believe is a better reading of the statute.

133. Caleb Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L. & CRIMINOLOGY AND POLICE SCI. 402, 402 (1960).

134. Sam Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343–47 (1942).  
The full text provides:

(1) a peace officer may stop any person abroad whom he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.

(2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.

(3) the total period of detention provided for by this section shall not exceed two hours. Such detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

135. Foote, *supra* note 133, at 402.

Montana's *Terry* statute ought to be read to draw an operative distinction between the words "request" and "demand." The statute itself delineates between two categories of persons (drivers and nondrivers) and two categories of actions (requests and demands). When it comes to nondrivers, the statute permits an officer to "request" a name, address, and explanation of the person's action. When it comes to drivers, the presence of the language "and, if" indicates that drivers are the inclusive category. When interacting with a driver, an officer may request all of the information that the officer could request of a nondriver, but additionally, the officer may demand certain items. As ordinarily understood, the words "request" and "demand" convey different meanings. While a survey of dictionary definitions supports the idea that there may be overlapping ground, primarily a request is understood as soliciting a gratuity whereas a demand seeks to enforce an obligation. These are functionally different acts, and this interpretation in the context of Montana's *Terry* statute accords with the presumption of meaningful variation because the legislature used both words in different places in the statute. Because the text of the statute supports this interpretation, it is unnecessary to dive into the legislative history. Nevertheless, the legislative history, specifically the concerns aired by Representative Shockley which prompted the legislature to specifically use the word "request" in order to provide a nondriver with the opportunity to decline to answer an officer free of consequence, supports this interpretation as well.

If I am correct that Montana's *Terry* statute ought to be read not to require an individual to comply with a request for their identity and an individual may not be charged with obstructing justice for their failure to reply, *Kroschel* presented an interesting question of whether a nondriver may lie in response to an officer's "request" for their name, as the facts indicate that Kroschel never explicitly declined to answer Officer Parsons' questions. I do not believe that this fact should control the outcome. If the statute does not permit a sanction for the failure to answer, I believe there can similarly be no sanction for the failure to answer truthfully.

Generally, Montana courts do not require individuals to use precise words to invoke their rights, as "lay people are not learned in constitutional principle nor legal nicety. To require precise words be uttered would elevate form over substance."<sup>136</sup> For example, if in response to an officer's request for a name, a person were to answer "Donald Duck," it has the same effect of telling the officer that one is invoking their statutory right not to answer. Here, Kroschel's evasive responses to the officer (that she left her identification in her stadium seat and that she could not recall her university identi-

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136. *State v. Johnson*, 719 P.2d 1248, 1255 (Mont. 1986) *overruled on other grounds by State v. Buck*, 134 P.3d 53 (Mont. 2006).

fication number) ought to be interpreted as invoking her statutory right. If the legislature believes this interpretation to be overly restrictive to law enforcement's ability to investigate suspicious criminal activity, then the legislature ought to consider repealing Montana's *Terry* statute in its entirety. The Fourth Amendment already permits those actions expressly authorized by the text of the statute and provides less restrictive constraints.

As for the conduct enumerated in the statute, the doctrine of *expressio unius* instructs that a court should not read words into the statute where they do not appear. In the context of Montana's *Terry* statute, it is likely that the legislature intended to capture the normative principle that an officer may ask certain questions that further the investigation of suspicious criminal activity where those questions are similarly akin to those enumerated in the statute. *Driscoll* seems to stand for the proposition that in the context of a suspected minor-in-possession charge, an officer may ask an individual her age. If the statute is construed not to demand compliance of a nondriver, there is likely no Fifth Amendment concern. Justice Gustafson believed the statute to be unconstitutional as applied to a person suspected of drinking underage. She reasoned that if the statute compels a person to provide their identity, demanding a person's name in circumstances where the person is suspected of drinking underage creates a "real and appreciable fear" that this information will be used to incriminate them in violation of their Fifth Amendment rights. However, if this information is not demanded, the as-applied argument is resolved.

## V. CONCLUSION

*City of Missoula v. Kroschel* asked the Court to answer an important question: what conduct is allowed of a police officer under Montana's *Terry* statute? The plain meaning of the statute indicates that the legislature intended to provide a nondriver with the right to decline to answer officer questioning free of consequence, which is a significant right. The legislative history supports this interpretation. Despite the textual and extrinsic evidence, the Court's analysis of the statute itself was too brief and leaves lower courts guessing as to how to construe it in the future.