APPLICATION FOR

DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full name.

   Martin David Lambert

2. Birthdate.

   [redacted]

3. Current home address.

   [redacted]

4. Email address.

   [redacted]

5. Preferred phone number.

   [redacted]

6. Judicial position you are applying for.

   District Judge, Department No. 4, 18th Judicial District.

7. Date you became a U.S. citizen, if different than birthdate

   Same

8. Date you become a Montana resident.

   May 15, 1955

B. EDUCATIONAL BACKGROUND

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.

Bozeman Senior High, Bozeman, MT, High School Diploma (1973)

Montana State University-Bozeman, B.A. Political Science (1978)

University of Montana, Missoula, MT, Juris Doctor (1983)

10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

Phi Eta Sigma, Freshman Honorary Society, MSU-Bozeman (1974)

Honors Graduate, Political Science, MSU-Bozeman (1978)

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.

Gallatin County Attorney 1997-present, Gallatin County, 1709 W. College, Bozeman, MT.

Chief Deputy Gallatin County Attorney, 1988-1997, Gallatin County, 615 S. 16th, Bozeman, MT.

Deputy Gallatin County Attorney, 1983-1988, Gallatin County, 615 S. 16th, Bozeman, MT.

Self-employed solo practitioner, Great Falls, MT, Lawyer; June-July, 1983;
I can't recall the street address.

12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

Montana Supreme Court – admitted June, 1983.

United States District Court of the District of Montana – admitted June, 1983.

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc).

Criminal prosecution – 50%

Civil Litigation where Gallatin County is either Plaintiff or Defendant – 20%

Land use and development – 15%

Representation of the County's elected officials – conduct of meetings, drafting contracts, resolutions, and the like – 15%

14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).

I taught at Bozeman High for years as part of the distributive Education – Business curriculum. I have lobbied on and off for the entire time I've served as Gallatin County Attorney. I was the past Chair of the County Attorney's Association Legislation Committee, and I currently serve on that Committee.

15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.

My duties as Gallatin County Attorney include frequent appearance in criminal cases, civil cases, and abuse and neglect of children cases, before the District Judges of the 18th Judicial District. I have represented Gallatin County before the Montana Supreme Court. On behalf of Montana's county attorneys and law enforcement, I have written *amicus curiae* briefs in Montana Supreme Court cases.

16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.

Gateway Opencut Mining Action Group, et. al., v. Board of Commissioners of Gallatin County, 2011 MT 198

Bassett v. Lamantia, 2018 MT 119 (amicus brief)

Rogers v. Lewis and Clark County, 2020 MT 230 (amicus brief)

17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.

a. The cases of *State v. Cody Little,* tried June 17-June 26, 2015; and *State v. Kevin Briggs,* tried on July 27–August 4, 2015, come to mind as challenging endeavors. The cases were tried to juries only one month apart. Both cases were high profile cases. Deliberate homicide, sexual crimes, and aggravated assault were among the charges tried. I spent over two months with the families of the victims and the survivors in those cases. I admired the bravery and endurance they displayed while going through a long and difficult process. For their sake I was greatly relieved when convictions were obtained and just sentences imposed on the offenders.

b. Property development is an important legal issue for a local jurisdiction like Gallatin County. In 2004 developers in Gallatin County took advantage of the "remainder" loophole in subdivision law to create large subdivisions with no subdivision review by the County Commissioners. I learned that the practice of using "remainders" to evade subdivision review was endemic in Montana. The Gallatin County Commissioners decided to challenge the developers and I filed a complaint in the district court. When the district court granted summary judgment to the defendants, the Commissioners voted to appeal. I briefed the case on behalf of the County. The Montana Supreme Court reversed and ruled in the County's favor. *Charlotte Mills, Clerk and Recorder of Gallatin County, v. Alta Vista Ranch, LLC,* 2008 MT 214.

c. Mental health is a complex issue that cuts across the lives of all Montanans. The issue is particularly vexing for the criminal courts and the justice system as a whole. To better serve our courts and our citizens suffering from mental illness, the Office of Public Defender, the Bozeman City Attorney's Office, and I formed the Virgil Project. For years we have met regularly, trying to assess and assist persons with mental health challenges who find themselves charged with offenses in Gallatin County's courts. If I were honored with appointment as a district judge I would work to try to bring additional resources to our Virgil Project.

18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.

None

19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.

<u>Montana County Attorneys Association</u>:

1. Topics of interest in land use and zoning law (Billings, December, 2011).

2. Admission of Social Media Evidence (Fairmont Resort, June, 2019).

National Business Institute:

1. Expert witnesses, direct and cross-examination of experts, and ethics pertaining to expert witnesses (May 26, 2016, Billings, Montana).

2. Admission of evidence of social media, e-mail and text messaging (February 15, 2017, Billings, and February 17, 2017, Helena, Montana).

3. Admission of evidence of social media, e-mail and text messaging (March 21 and 22, 2019, Billings, Montana).

4. Montana's public records and open meetings laws (March 12, 2020, Missoula, Montana).

5. Scheduled for a Zoom CLE lecture on Montana's public records and open meetings laws. (November 17, 2021).

20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.

Attorneys who work for the government are exempt from having to report *pro bono* hours of service. I have, however, provided legal assistance for nonprofit entities. I helped incorporate the Montana Chamber Music Society. When I became an Advisory Board member for Intermountain Opera of Bozeman (2017), and was no longer a Director, I have reviewed contracts, helped with insurance matters, reviewed governance documents, and provided other legal help to Intermountain Opera of Bozeman.

21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.

Montana County Attorneys Association – I was a director, officer, President, Chairman of the Legislation Committee, Chairman of the Amicus Committee, and I'm currently serving as a director (1997-present)

22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.

None

23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.

None

24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.

Since 2007 Kathryn and I have been landlords and have handled the rental of a home we own. The creation of leases, collection of rent, and other matters pertaining to our tenants was and is interesting and at times challenging. That experience will be quite valuable when asked to decide landlord –tenant issues.

D. COMMUNITY AND PUBLIC SERVICE

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.

Gallatin County DUI Task Force – I received its Swimming Upstream Award in 2011.

Intermountain Opera of Bozeman – I served as a Director in 2016-2017. I became an advisory Board Member in 2017, and I presently serve as an Advisory Board Member of IOB.

I am currently the President of the Montana Chamber Music Society. I helped incorporate MCMS, a Montana nonprofit corporation, in 2011. I served as a Director beginning in 2011. I served as the Society's Secretary from 2012-2017. I have served as the Society's President since 2017.

26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

Gallatin County Attorney - appointed by the Gallatin County Commission as Gallatin County Attorney in January, 1997; elected Gallatin County Attorney in November, 1999; re-elected as Gallatin County Attorney in November, 2002; 2006; 2010; 2014; and 2018.

I did seek, unsuccessfully, district court judicial nominations in 2004 and 2016.

E. PROFESSIONAL CONDUCT AND ETHICS

27. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No

28. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

Yes. In January 1992, District Judge Larry Moran sanctioned me by ordering that I could not prosecute the case of *State of Montana v. Larry Moore.* I privately told a joke about bankrupting the defendant. Defense counsel learned of the joke and confronted me about it in court. I also gave a forensic report to the attorney representing the homicide victim's estate without proper authorization.

29. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

No

30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).

No

31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No

F. BUSINESS AND FINANCIAL INFORMATION

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.

I currently serve as the President, and I serve as a Director, of the Montana Chamber Music Society, a Montana nonprofit corporation. I serve as an Advisory Board member of Intermountain Opera of Bozeman. If appointed judge, I will follow Montana's Code of Judicial Conduct regarding the extent to which I might continue to serve MCMS and IOB.

In September, 2021, Kathryn and I created a Montana limited liability corporation, Little Bluebird, LLC, to manage the rental property we own. I don't believe being a member and manager of that entity creates any conflict with the office of district judge.

33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.

Yes

34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details.

No

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a district court judge.

I've had the honor and good fortune to have a long legal career of service to Gallatin County's citizens. From my viewpoint, the best way to finish my career in the courtroom would be to serve as a District Court judge.

A district court judge is subject to great public scrutiny. On occasion during my service as County Attorney I have been criticized for declining to prosecute a case or file a civil action, or negotiating a particular resolution to a case. Likewise, a judge will deliver opinions and rulings that will be criticized by lawyers, parties, and members of the public. Criticism based on emotion or misunderstanding of the facts and the law involved in the case often is unfair criticism. Notwithstanding such unfair criticism, a judge must make the proper and fair ruling. A good judge will be at peace with the fact that only rarely can he or she make public reply to such criticism, and such a judge provides a valuable service to his or her community and the legal profession. I think I'm in a good place in my career to provide such service to the citizens of Gallatin County and the State of Montana.

36. What three qualities do you believe to be most important in a good district court judge?

Work ethic. A district judge in the 18th Judicial District must be a hard worker. For years I've demonstrated that I have the work ethic needed to properly handle the job.

Patience. A district judge serving in the 18th Judicial District must handle a large caseload. The district judge will have his or her work day frequently interrupted with the need to deal with emergent matters such as cases involving mental health crises of citizens and the abuse of children. District judges already preside over many cases involving self-represented litigants, and the number of such cases will increase in the future. Despite a hectic schedule, a demanding workload, and matters handled by inexperienced lawyers and self-represented litigants, a district judge must take the time needed to be assiduously fair to the litigants and attorneys.

Consistency. Many of a district judge's cases will never get the attention of the public at-large. From time-to-time, however, given the matters at issue, or the lawyers or parties to the litigation, a case may receive intense public scrutiny. A good judge will handle such a case, and its lawyers and the parties, in the same way he or she has handled past cases with similar issues.

37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

The Legislature is the branch closest to the people of Montana. To illustrate the point, a Representative serves only a two-year term – much different than the six-year term of a District Judge. When asked to rule on matters of statutory interpretation, judges must respect the Legislature's intent and avoid inserting their own views on policy matters. Policy matters should be decided, wherever possible, by the Legislature, and not the courts.

Law school students are taught that a judge's or court's ruling on a constitutional issue must be made on the narrowest possible grounds. Further, law school students learn that a judge or a court should avoid, if at all possible, ruling on constitutional matters. It is easy for judges publically to espouse these views; it is quite another to exercise the discipline needed follow them in practice. I believe a judge must take care not to rule on matters that have not been raised and properly argued and briefed by the lawyers to the litigation.

H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.

Crawford v. Washington, 541 U.S. 36 (2004), was a seminal United States Supreme Court case interpreting the 6th Amendment's Confrontation Clause. *Mizenko* was the Montana Supreme Court's first opportunity to consider the admission of hearsay evidence after the *Crawford* decision. Attached is an amicus brief I filed on behalf of the Montana County Attorney's Association in *State v. Mizenko,* 2006 MT 11, 330 Mont. 299, 127 P.3d 458.

39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

Kurt Alme, Email: Kurtalme11@gmail.com - phone: (406) 591-9710

William W. Mercer, P.O. Box 2118, Billings, MT 59103; phone: (406) 896-4607

Hon. Karl P. Seel, Bozeman Municipal Court, 615 S. 16th, Bozeman, MT 59715;
Phone: (406) 582-2040

CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

10/11/2021 _____
(Date)

_____
(Signature of Applicant)

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 04-488

STATE OF MONTANA,

Plaintiff and Respondent,

vs.

GREGORY MICHAEL MIZENKO,

Defendant and Appellant.

AMICUS BRIEF OF THE MONTANA COUNTY ATTORNEYS' ASSOCIATION

ON APPEAL FROM THE TWELFTH JUDICIAL DISTRICT COURT, CHOTEAU COUNTY

APPEARANCES

MIKE MCGRATH
Montana Attorney General
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AND RESPONDENT

JOHN KEITH ,
Strain Bldg., Suite 322
410 Central Avenue
Great Falls, MT 59401

ATTORNEY FOR DEFENDANT
AND APPELLANT

MARTY LAMBERT
Gallatin County Attorney
Judge Guenther Memorial Center
1709 W. College
Bozeman, MT 59715

ATTORNEY FOR AMICUS CURIAE
MONTANA COUNTY ATTYS' ASSN.

STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion when it overruled Mizenko's objections and admitted the victim's statements under the excited utterance exception to the hearsay rule?

STATEMENT OF THE CASE

Amicus Curiae MCAA agrees with Plaintiff/Respondent State of Montana's Statement of the Case.

STATEMENT OF THE FACTS

Amicus Curiae MCAA agrees with Plaintiff/Respondent State of Montana's Statement of the Facts.

SUMMARY OF THE ARGUMENT

The victim's statements, made to her neighbor, a 911 dispatcher, and the police officer responding to her aid, were spontaneously made and were not the product of a formal interview or police interrogation. The victim's statements were therefore not "testimony," as described in the *Crawford* decision. Admission of the statements did not offend Mizenko's rights to confrontation. The statements were properly admitted during Mizenko's trial.

ARGUMENT

I. UNDER *CRAWFORD* THE ADMISSIBILITY OF HEARSAY FROM NON-TESTIFYING WITNESSES IS DETERMINED BY JUDGING WHETHER THE HEARSAY IS "TESTIMONY" AND NOT WHETHER IT IS RELIABLE.

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), profoundly changed the U.S. Supreme Court's views of the Sixth Amendment Confrontation Clause and the admissibility of hearsay from non-testifying witnesses.

Prior to *Crawford,* the Court focused on the reliability of the hearsay statement to determine whether its admission would contravene the Confrontation Clause. *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). In *Crawford,* Justice Scalia wrote that

> [o]ur cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.

Crawford, 541 U.S. ___, 124 S.Ct.at 1369. Having made this determination, the Court criticized *Roberts,* turning its focus from the "reliability" of the statement to whether the statement of the non-testifying witness constituted "testimony." *Id.* at 1373-75. Although the Court declined to adopt a definition of testimony, the Court made these observations:

> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with the closest kinship to the abuses at which the Confrontation Clause was directed.

Id. at 1374. Likewise the Court did not define the term interrogation:

> We use the term "interrogation" in its colloquial, rather than in any technical legal, sense. (citation omitted) Just

> as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case.

Id. at 1365, Fn. 4. By not defining "testimony" and "interrogation" in *Crawford*, Justice Scalia vested a large amount of discretion in the lower courts to determine, on a case-by-case basis, whether hearsay statements constitute testimony.

II. THE VICTIM'S STATEMENTS WERE NOT TESTIMONIAL AND THUS WERE PROPERLY ADMITTED AGAINST MIZENKO.

a. Background - Post-*Crawford* cases.

In *Maine v. Barnes,* 854 A.2d 208 (Me. 2004), the Supreme Court of Maine reconsidered its order affirming a murder conviction, in light of the admission of the victim's statements implicating the *Crawford* decision.

Approximately 20 months before her death, defendant's mother came to the police to report the following:

> The officer testified that Barnes's mother drove herself to the police station in March 1998 and came into the station sobbing and crying. She continued crying despite efforts to calm her, and she said that her son had assaulted her and threatened to kill her more than once during the day. Because she was clutching her chest and indicated a history of heart problems, the officer called an ambulance for her.

854 A.2d at 209.

In terms the analysis of the Confrontation Clause conducted in the *Crawford case,* the Court reviewed these statements of the victim as follows:

> First, the police did not seek [defendant's mother] out. She went to the police station on her own, not at the demand or

> request of the police. Second, her statements to them were made when she was still under the stress of the alleged assault. Any questions posed to her by the police were presented in the context of determining why she was distressed. Third, she was not responding to tactically structured police questioning as in *Crawford,* but was instead seeking safety and aid. The police were not questioning her regarding known criminal activity and did not have reason, until her own statements were made, to believe that a person or persons had been involved in any specific wrongdoing.

Id. at 210. The Court concluded that the Defendant's mother was not giving "testimony" to the police, and her statements were properly admitted pursuant to the holding of *Crawford. Id.* at 212.

People v. Corella, 122 Cal.App.4th 461, 18 Cal.Rptr.3d 770 (2d.Dist.Ct.App. Cal. 2004) was a domestic violence case where the victim reported her assault to 911, medical and police personnel. 122 Cal.App.4th at 464. The trial court admitted the statements as "spontaneous" statements pursuant to California evidentiary law. *Id.* at 464.

The Court found that, in order to trigger *Crawford's* testimonial prohibitions, interrogation must be part of a "relatively formal [police] investigation where a trial is contemplated." *Id.* at 468. The Court held that the 911 call "[bore] no indicia common to the official and formal quality of the various statements deemed testimonial by *Crawford,*" *Id.* at 468. The Court noted that 911 calls create a unique situation:

> As has been stated in a New York case, a "testimonial statement is produced when the government summons a citizen to be a witness; in a 911 call, it is the citizen who summons the government to her aid." (citation omitted) Not only is the victim making a 911 call in need of assistance, the 911

> operator is determining appropriate response, not conducting a police interrogation in contemplation of a future prosecution.

Id. at 468. Likewise the Court found that when the officer arrived in response to the victim's 911 call

> Mrs. Corella's spontaneous statements describing what had just happened did not become part of a police interrogation merely because Officer Diaz was an officer and obtained information . . . Such unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police interrogation as that term is used in *Crawford*.

Id. at 469. The Court upheld the admissibility of the statements Mrs. Corella made to 911, as well as those she made to Officer Diaz. *Id.* at 468.

The Ninth Circuit Court of Appeals reviewed the admission of statements made to police and dispatchers by a murder victim the day before her death. *Leavitt v. Arave,* 383 F.3d 809 (9th Cir. 2004). The victim was

> . . . severely frightened on the night before her death by a prowler who tried to break into her home. In a great state of agitation . . . she said that she thought the prowler was Leavitt, because he had tried to talk himself into her home earlier that day, but she had refused him entry.

Id. at 830. Although *Crawford* was decided after oral argument in the Leavitt case, the Court, in a lengthy footnote, addressed the Crawford decision, discussed the victim's statements, found that they did not constitute testimony and therefore that the Confrontation Clause was not violated by admission of the statements. *Id.* at 830, Fn. 22.

Similarly, a trial court found that statements made by a victim to friends, indicating that appellant had threatened her with a knife, were admissible as excited utterances. On appeal, the West Virginia Supreme Court found that, because the statements were made to "non-official and non-investigatorial witnesses," the statements were not testimony under the *Crawford* decision. *State v. Ferguson,* 607 S.E.2d 526, 529 (W.Va. 2004).

b. The statement to neighbor Dawn Grove.

In the present case, the statements made by the victim to Dawn Grove are similar to those made by the victim in the *Ferguson* case. The statements were made at a time in close proximity to the crime and were not made to the police, to 911 dispatchers, or to anyone else with an official view of the investigation. The statements are not testimony as discussed in *Crawford* and therefore Mizenko's rights of confrontation were not violated by the District Court's admission of these statements.

c. The statement to 911 Dispatcher Tami King.

Statements to 911 emergency dispatchers were discussed in the *Corella* and *Leavitt* cases. There the appellate courts reasoned that statements made to 911 dispatchers were not formal or investigative in nature. This reasoning is sound and should be followed by this Court. A testimonial statement is taken when the "government summons a citizen to be a witness;" by way of contrast, a 911 statement is made after "the citizen summons the

government to her aid." *Corella, supra,* at 468. The statements made by the victim in the present case to dispatcher King were not testimonial as discussed in *Crawford,* and admission of those statements did not violate Mizenko's rights of confrontation.

d. The statement to Deputy Scott Buennemeyer.

Amicus MCAA recognizes that this Court will likely give the greatest scrutiny to the decision to admit the victim's statements to the Deputy who responded to the victim's 911 call. Because of the investigative nature of the Deputy's actions, it may be argued that these statements most closely fit Justice Scalia's notions of testimony as discussed in the *Crawford* case. It is important to note, however, that Justice Scalia declined to adopt a definition of testimony, leaving to the state and federal courts the job of reviewing the facts and circumstances of each individual case and then judging whether the hearsay statements were testimony. *Crawford, supra,* 124 S.Ct. U.S. at 1374.

Three of the cases set forth above carefully analyzed statements made to police officers to determine if admission of the hearsay offended the Confrontation Clause: *Barnes, supra,* 854 A.2d at 210; *Corella, supra,* 122 Cal.App.4th at 468-69; and *Leavitt, supra,* 389 F.3d. at 830, Fn. 22. In each case the court found no Confrontation Clause violation from admission of the statements. The reasoning of these courts is logical and sound, and is worthy of adoption by this Court.

The facts and circumstances of this case clearly establish

that the victim's statements are non-testimonial in nature. The victim's statements to Deputy Buennemeyer were made immediately after the Deputy's arrival at Mizenko's residence. The victim was still "shaky and upset." Res.Brf., St.Facts, pg. 2. The victim's statements to the Deputy consisted only of the following: identification of a hank of hair as the victim's; and that Mizenko had pulled the hair from the victim's head. The discourse between the victim and Deputy Buennemeyer was quite informal and lacked all the traditional trappings of police interrogation. Just as in *Corella,* this Court should recognize that

> [p]reliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an "interrogation." Such unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police interrogation as that term is used in *Crawford.*

122 Cal.App.4th at 469. A careful review of *Crawford* and its Confrontation Clause analysis leads to the conclusion that these two statements were not testimony, and no error resulted from the admission of the statements.

CONCLUSION

The hearsay statements of the victim were properly admitted during Mizenko's trial. The statements are non-testimonial and the admission of the statements did not violate the *Crawford* holding and Mizenko's rights of confrontation. Respondent's Brief cogently analyzes the admission of the statements in terms of

Montana's evidentiary rules and this Court should take guidance from that analysis.

The rulings of the District Court should be affirmed.

DATED this ____ day of March, 2004.

Marty Lambert
Attorney for Amicus Curiae
Montana County Attorneys' Assn.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was duly served by first class mail addressed as follows this ____ day of March, 2005.

Marty Lambert

MIKE MCGRATH
Montana Attorney General
P.O. Box 201401
Helena, MT 59620-1401

JOHN KEITH
Strain Bldg., Suite 322
410 Central Avenue
Great Falls, MT 59401

STEPHEN GANNON
Choteau County Attorney
P.O. Box 459
Fort Benton, MT 59442

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27, M.R.App.P., I certify that this brief is printed with a monospaced Word for Windows Courier New test typeface of twelve points; is double-spaced; and the brief is not more than 14 pages.

Marty Lambert