APPLICATION FOR

DISTRICT COURT JUDGESHIP
Eighteenth Judicial District

A. PERSONAL INFORMATION

1. Full Name: Martin David Lambert

   a. What name do you commonly go by? Marty Lambert

2. Birthdate: [redacted] Are you a U.S. citizen? Yes

3. Home Address: [redacted] Phone: [redacted]

4. Office Address: 1709 W. College, Bozeman, MT 59715 Phone: 406-582-3745

5. Length of residence in Montana: 61 years

6. Place of residence for the last five years:

Dates	City	State
9/2011 – 9/2016	1611 Willow Way, Bozeman	Montana

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended beginning with high school:

Name	Location	Date of Degree	Degree
Bozeman Senior High	Bozeman, MT	1973	HS Diploma
Montana State University	Bozeman, MT	1978	B.A. Political Science
University of Montana	Missoula, MT	1983	Juris Doctor

8. List any scholarships, awards, honors and citations that you have received:

National Honor Society, Bozeman Senior High (1972)

Phi Eta Sigma, Freshman Honorary Society (1974)

Honors Graduate, Montana State University (1978)

Certificate of Appreciation for Service as Director, Bozeman Campfire (1993)

Award for service as Director and President, Hearts and Homes, Inc. (1995)

Certificate of Appreciation for Service as Chief Deputy County Attorney (1995)

Past Distinguished President, Bozeman Kiwanis (1999-2000)

Swimming Upstream Award, Gallatin County DUI Task Force (April, 2011)

9. Were you a member of the Law Review? If so, provide the title and citation of any article that was published and the subject area of the article.

No.

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

Court or Administrative Body	Date of Admission
Montana Supreme Court	June, 1983
United States District Court, District of Montana	June, 1983

11. Indicate your present employment. (List professional partners or associates, if any).

Gallatin County Attorney, Gallatin County, Montana

12. State the name, dates and addresses of law firms with which you have been associated in practice, governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

Employer's Name	Position	Dates
Self-employed solo practitioner in Great Falls I can't recall the street address.	Lawyer	June-July, 1983
Gallatin County, 615 S. 16th, Bozeman, MT	Deputy County Attorney	1983-1988
Gallatin County, 615 S. 16th, Bozeman, MT	Chief Deputy County Attorney	1988-1997
Gallatin County, 1709 W. College, Bozeman, MT	Gallatin County Attorney	1997-present

13. If you have not been employed continuously since completion of your formal education, describe what you were doing.

I have been employed continuously since graduating from law school.

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

As Gallatin County Attorney, I serve over 100,000 people in the fastest growing county in the region. I am responsible for prosecuting all felony crimes committed in the county, as well as all misdemeanor crimes committed outside of incorporated cities located within the county. I am responsible for all the county's child abuse, elder abuse, juvenile, and involuntary commitment cases. I am responsible for advocacy on behalf of crime victims in Gallatin County's courts.

I represent and advise Gallatin County's elected officials, department heads and volunteer boards. I defend lawsuits against the county and file cases on behalf of the county.

To meet these responsibilities, I hire and supervise 22 staff: ten attorneys, six administrative workers, and six victim/witness advocates.

My own legal work for the past couple of years has been 85% criminal and 15% civil. I prosecute felony cases from start to finish. I draft and review contracts and resolutions. I advise officials and department heads on matters such as land use, zoning and development; personnel; taxation; procurement of insurance, and defense of civil claims.

I spend considerable time on administrative matters, particularly during the months of March through August, when the County Commissioners discuss and set the budget for the upcoming fiscal year.

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

Member, Business Education Department Advisory Committee, Bozeman Senior High School (1999-present)

Attorney General's Law Enforcement Advisory Committee (2002-2003)

Montana Department of Corrections Advisory Committee (2002-2004)

President, Montana County Attorney's Association (2004-2005)

Chairman, Legislation Committee, Montana County Attorney's Association

Instructor, Montana Law Enforcement Academy (1985-1991)

Instructor, Montana Highway Patrol Academy

16. If you specialize in any field of law, what is your specialty?

Criminal law; local government law; land use and zoning law.

17. Do you regularly appear in court?

Yes, I regularly appear in court.

What percentage of your appearance in the last five years was in:

Federal court	1%
State or local courts of record	99%

18. During the last five years, what percentage of your practice has been trial practice?

I estimate that 75% of my practice has been trial practice.

19. How frequently have you appeared in court?

I estimate I appear eight times per month in the district courts.

20. How frequently have you appeared at administrative hearings?

I have not appeared in administrative hearings for some time. In August, 2002, I represented Gallatin County before the Board of Oil and Gas Conservation (*In re: Application of J.M. Huber Corporation to Drill Two Oil and Gas Wells in Gallatin County, Montana,* Dk.No. 209-2002).

In June, 2003, I represented the City-County board of Health before Jan Sensibaugh, Director of the Department of Environmental Quality. (*In Re: Corrine Selby Appeal under M.C.A. Sec. 75-5-305*).

21. What percentage of your practice involving litigation has been:

Civil	20%
Criminal	80%

22. Have you appeared before the Montana Supreme Court within the last five years? If so, state the number and types of matters handled. Include the case caption, case citation (if any), and names, addresses and phone numbers of all opposing counsel for the five most recent cases.

Yes. I represented Gallatin County in *Gateway Opencut Mining Action Group, et. al., v. Board of Commissioners of Gallatin County,* 2011 MT 198, 361 Mont. 398, 260 P.3d 133. The case involved Gallatin County's attempt to adopt zoning regulations to govern gravel pit operations.

The appellants were represented by Roger Sullivan, 341 1st Ave. East, Kalispell, MT 59901 (406-752-5566); and Kim Wilson, 401 N. Last Chance Gulch, Helena, MT 59601 (406-442-3261).

The Intervenors were represented by Susan Swimley, 1807 W. Dickerson, Suite B, Bozeman, MT 59715 (406-586-5544); Brian Gallik, 777 E. Main, Bozeman, MT 59715 (406-404-1728); James Shuler, 44 w. 6th Ave., Suite 200, Helena, MT 59601 (1-800-639-9850); Ben Alke, 35 N. Grand Ave., Bozeman, MT 59715 (406-587-0618); and John Alke, 40 W. Lawrence St., Suite A, Helena, MT 59601 (406-442-3690).

23. State the number of jury trials that you have tried to conclusion in the last ten years.

I estimate 18 jury trials.

24. State the number of non-jury trials that you have tried in the last ten years.

I recall one non-jury trial.

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, provide the same information regarding opposing counsel and the nature of the matter.

State v. Shawn Visintin, No. DC-15-30A; trial was May 18-20, 2016; Hon. Holly Brown presided (406-582-2160). Defense counsel was Ashley Whipple, 251 Edelweiss Dr., Suite 2, Bozeman, MT 59718; (406-581-4651).

State v. Sherry Michelle Jackson, No. DC-14-96C; trial was March 26-27, 2015; Hon. John C. Brown presided (406-582-2150). Defense counsel was John Hud, 4055 Valley Commons Dr., Suite B, Bozeman, MT 59718; (406-587-8989).

State v. Kevin Briggs, No. DC-14-71AX; trial was July 27–August 4, 2015. Hon. Mike Salvagni presided (406-582-2140). Defense counsel were Annie DeWolf, Regional Public Defender, 502 S. 19th Ave., Bozeman, MT 59715; (406-582-2450); Randi Hood (I'm told she is retired), Major Crimes Unit of the Office of Public Defender, 139 N. Last Chance Gulch, Helena, MT 59601, 406-444-9262, and Nick Miller, Regional Public Defender, 502 S. 19th Ave., Bozeman, MT 59715; (406-582-2450).

State v. Cody Little, No. DC-13-233A; trial was June 17-June 26, 2015; Hon. Holly Brown presided (406-582-2160). Defense counsel were Chris Petaja, 13 S. Willson, Suite 3, Bozeman, MT 59715, 406-570-0440; and Diana Copeland, Regional Public Defender, 502 S. 19th Ave., Bozeman, MT 59715; (406-582-2450).

State v. David Udeen, DC-13-282B; trial was April 21-23, 2015; Hon. Mike Salvagni presided (406-582-2140). Defense counsel were Annie DeWolf and Diana Copeland, Regional Public Defender, 502 S. 19th Ave., Bozeman, MT 59715; (406-582-2450).

State v. Jason Walker, DC-13-241C; trial was August 31-September 2, 2015; Hon. John C. Brown presided (406-582-2150). Defense counsel was Nick Miller, Regional Public Defender, 502 S. 19th Ave., Bozeman, MT 59715; 406-582-2450.

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

None during the past five years.

27. If you have published any legal books or articles, other than Law Review articles, list them, giving citations, dates, and topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, state the topic, date, and group to which you spoke.

Montana County Attorney's Association, at least twice – the topics were DNA evidence (July, 1992), and topics of interest in land use and zoning law (Billings, December, 2011)

National Business Institute, May 26, 2016, in Billings, Montana - expert witnesses and ethics pertaining to expert witnesses

Gallatin County Bar Association, I can't recall the year – status of mental health services available in Gallatin County

State Bar of Montana – Helena, 1992 – Electronic Surveillance

I am scheduled to lecture for the National Business Institute on evidence pertaining to social media, e-mail and text messaging in Billings, February 15, 2017, and in Helena, February 17, 2017

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member. Provide the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

State Bar of Montana (1983 – present)

Gallatin County Bar Association (for many years, I can't recall exactly when I became a member)

Montana County Attorney's Association – I was a director, officer, and President, Chairman of the Legislation Committee, and member of the Amicus Committee (1997-present)

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. State the title and date of any office that you have held in each organization. If you held any offices, describe briefly your activities in the organization.

Montana Chamber Music Society – we fund, organize and present chamber music concerts in Montana. We principally sponsor concerts performed by the world-renowned Muir Quartet and its musical guests. We sponsor Noon Notes, a music series of concerts presented to grade school children and others. I serve on the Board of Directors. I have served as Secretary, and currently I serve as Vice-President. (2013-present)

Intermountain Opera Co. – I joined the Board of Directors in 2016. We fund, organize and present full operas to the Bozeman community.

Gallatin County Multidisciplinary Team (the team operates pursuant to §52-2-211, MCA, and is focused on child protection matters).

Gallatin County DUI Task Force.

30. Have you ever run for or held public office? If so, provide the details.

Yes. I was appointed Gallatin County Attorney in 1997.

I was elected Gallatin County Attorney in 1998; and I was re-elected County Attorney in 2002; 2006; 2010; and 2014.

31. Explain your philosophy of public involvement and practice of giving your time to community service.

Attorneys have great opportunities to serve the public. Attorneys may demonstrate commitment to public service through their employment choices. I am proud to have served as a lawyer for Gallatin County and the people of the State of Montana for 33 years.

Attorneys have considerable influence within our communities. Many attorneys have leadership and organizational skills that may be put to good use, through community service, to improve the lives of the citizens of our communities. I am proud to have served in a number of service and non-profit organizations in Gallatin County.

I have served the community by serving as an officer and director in Boys and Girls Club; a volunteer and mentor for Prevent Child Abuse, Inc.; a Director of Campfire, Inc.; an officer and director for Bozeman Kiwanis; a volunteer lecturer for Ms. Redmond's business law classes at Bozeman High School; director, Secretary and Vice-President of the Montana Chamber Music Society; and a director of Intermountain Opera.

E. PROFESSIONAL CONDUCT AND ETHICS

32. 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.

33. 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.

34. 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.

No.

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, provide the details.

No.

36. Is there any circumstance or event in your personal or professional life that would, if brought to the attention of the Commission, Governor or Montana Supreme Court, 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

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, provide the details, including dates.

No.

38. If you are an officer, director, or otherwise engaged in the management of any business, provide the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

No.

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, identify the source and the approximate percentage of your total income it constituted over the last five years.

I received $50.00 from NBI for making a CLE presentation in Billings.

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or that in any manner or for any reason might embarrass you? If so, please explain.

No.

41. If appointed by the Governor, are you prepared to disclose the information required under 2-2-106, MCA (i.e., the name, address and type of your business; any present or past employer from which you currently receive benefits; any business or professional entity or trust in which you hold an interest; any entity in which you are an officer or director; and any real property, other than a personal residence, in which you hold an interest)?

Yes.

42. Have you filed appropriate tax returns as required by federal, state, local and other government authorities?

Yes.

If not, please explain.

N/A

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?

No.

If yes, please explain.

N/A

44. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, provide the details.

No.

G. WRITING SKILLS

45. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. State if associates or others have generally performed your research and the writing of briefs.

I have researched issues and drafted briefs in numerous criminal cases. I have researched and drafted briefs in civil cases where the county, its officers and employees were sued, and in the Montana Supreme Court in a zoning case.

I generally draft and research all the briefs I submit. Recently Deputy County Attorneys Bjorn Boyer, Jesse Bushnell, and Russ Hart drafted briefs that I revised and submitted in four different criminal cases. Deputy County Attorney Erin Arnold drafted a brief that I submitted in a civil case.

46. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., explain the type and extent of writing that you have done.

I have drafted resolutions and ordinances for the County Commissioners; opinions and letters related to the duties of the county's officials and employees; proposed legislation for the Legislature's consideration; and contracts for conduct of the county's business.

47. Attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable.

Crawford v. Washington, 541 U.S. 36 (2004), was a seminal case regarding interpretation of the 6th Amendment's Confrontation Clause. 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.

Mizenko was the Montana Supreme Court's first opportunity to consider the admission of hearsay evidence after the *Crawford* decision.

48. What percentage of your practice for the last five years has involved research and legal writing?

80 %

49. Are you competent in the use of Westlaw and/or Lexis?

Yes, Westlaw.

H. MISCELLANEOUS

50. Briefly describe your hobbies and other interests and activities.

In August Kathryn and I were blessed with our third grandchild. We're so fortunate to have three grown children, all of whom are doing well with their families and careers. I would like to spend a lot more time with them.

I'm an avid reader. I am a violinist, I play the piano, and I enjoy music.

Recently Kathryn and I have ventured into ballroom dancing and we find that very enjoyable and relaxing.

I'm a regular (this summer unfortunately only a semi-regular) at Access Gym.

51. Describe the jobs that you have held during your lifetime.

Grocery stock clerk and checker, Safeway.

Landscape crew at Big Sky, Montana.

Pipelayer for Frank J. Trunk & Sons of Bozeman, Montana.

Night Clerk, Lewis and Clark Motel, Bozeman.

52. Identify the nature and extent of any pro bono work that you have personally performed during the last five years.

None.

53. In the space provided, explain how and why any event or person has influenced the way that you view our system of justice.

I met Mike Salvagni in the summer of 1981. I worked that summer as an intern for the county attorney. Judge Salvagni was in private practice at that time and also worked as one of Gallatin County's contract public defenders. County Attorney Salvagni hired me in July, 1983, and I worked for him for 13 years.

No lawyer could have a better mentor. I was passionate about my work and impatient with things that took, in my view, too much time. County Attorney Salvagni taught me the importance of thoroughness and accuracy in advising law enforcement officers and county officials. Mike

Salvagni's commitment to public service truly was exemplary and left a lasting impression on me.

County Attorney Salvagni broadened and tempered my views of persons accused of crime. I listened to County Attorney Salvagni's thoughts on mitigating sentencing factors such as drug and alcohol abuse. That perspective led to my association with Judge Thomas Olson and the founding of Gallatin County's Treatment Court in 1999.

After he took the bench, District Judge Mike Salvagni insisted on displays of professionalism and courtesy among the lawyers. I have had the good fortune to absorb and learn from him throughout my career.

54. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

A judge of the 18th Judicial District is responsible for an enormous number of cases. To handle such a caseload the judge daily must take the bench, patiently hear the lawyers, learn of the myriad difficulties encountered by the parties, and timely submit well-considered decisions. The willingness to commit the time and effort to perform such important duties is an essential quality for a good judge. A Gallatin County District Court Judge must be a hard worker who regularly puts in well over 40 hours a week.

On occasion during my service as a prosecutor I have been criticized for declining to prosecute a case 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.

55. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

Precedent is needed for lawyers to make accurate assessment of the merits of a claim. Providing clients and crime victims with an accurate assessment of the merits of a claim, and the likely outcome of litigation based on that claim, is one of the most valuable contributions a lawyer can make to the client's cause and to our justice system.

Precedent is the cornerstone of the predictability of the law. When precedent does not exist or is not clear, or where it is not followed by a court, a lawyer's ability accurately to assess a claim will diminish. In such circumstances a client's faith in the lawyer and the justice system likewise will diminish, and the client's time and money will be adversely affected.

Precedent therefore should be given considerable weight by a district judge. A district judge should rule contrary to well-established precedent only when compelling reasons exist for doing so.

56. In the space provided, state the reasons why you are seeking office as a district court judge.

I have served my community as county attorney, and I'm ready to serve as its next district judge. I am at an ideal point in my career to take up the responsibilities of a district judge. At 61 years of age, and with 33 years' experience in the law, I have the background, experience and energy to serve the public and the bar as district judge.

57. What items or events in your career have distinguished you or of which you are most proud?

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, I convinced the Commissioners 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, 344 Mont. 212, 187 P.3d 627.

I take pride in my role in *Mills.* Montana's high-growth counties are under significant pressure from residential and commercial real estate developers. County commission review is needed to ensure orderly, as opposed to haphazard, growth.

I also take pride in Gallatin County's victim/witness office. Around 1993 County Attorney Mike Salvagni and Gloria Edwards started and built a fine victim/witness program. The victim/witness staff has increased from two to five advocates during my tenure. Haven, which provides civil assistance and advocacy for domestic and sexual assault victims, and the CASA/GAL coordinator, share offices with my victim/witness staff. This arrangement enhances our abilities to protect children and crime victims from harm.

58. Provide any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

Please see my answer to question 33 above.

59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

My career is one of service to Gallatin County's citizens. With no disrespect to my fellow applicants, I ask the Nominating Commission to take my extensive experience and continuing commitment to Gallatin County's citizens into account in making its decision.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 18th Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

September 21, 2016 (Date)

(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by ***5:00 p.m. on Wednesday, September 21, 2016***.

Mail the signed original to:

Office of Court Administrator
c/o Lois Menzies
P.O. Box 203005
Helena, MT 59620-3005

Send the electronic copy to: mtsupremecourt@mt.gov

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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ATTORNEYS FOR PLAINTIFF
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.

_____
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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.

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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