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STATE V. MIZENKO: THE MONTANA SUPREME COURT WADES INTO THE POST-CRAWFORD WATERS

Andrew King-Ries*

I. INTRODUCTION

On April 15, 2005, the Montana Supreme Court heard oral argument in State v. Mizenko. Mizenko offered the court its first real opportunity to wade into the uncertain Confrontation Clause waters left in the wake of the United States Supreme Court's landmark decision in Crawford v. Washington. On January 11, 2006, nearly eight months after oral argument, a divided court issued its opinion and floated its definition of what constitutes a testimonial statement. The court's decision provides enhanced protection of defendants' confrontation rights, while at the same time preserving some flexibility for prosecutors, particularly in the area of domestic violence. The court's carefully crafted testimonial definition allows for the coexistence of these competing realities, although the success of the court's aim to protect confrontation and provide flexibility will only become clear with time.

This Article will discuss the Mizenko decision and place it into the larger post-Crawford Confrontation Clause context. Section II will briefly discuss the Crawford decision and the changes it made to the landscape of hearsay evidence. Section III will discuss the scholarly reaction to Crawford and the variety of testimonial for-

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1. The Montana Supreme Court also heard argument in State v. Paoni, 2006 MT 26, 331 Mont. 86, 128 P.3d 1040, which was consolidated with State v. Mizenko, 2006 MT 11, 330 Mont. 299, 127 P.3d 458, for purposes of oral argument. As will be discussed, the Mizenko decision largely changed the confrontation clause analysis in Montana. The Paoni decision was decided on procedural grounds that did not add to the development of the confrontation law. For these reasons, this article will focus on the court's decision in Mizenko.


mulations posited by that commentary. Section IV will focus specifically on the response to *Crawford* by Professor Mosteller, upon whose article the Montana Supreme Court heavily relied.\(^4\) Understanding the convergences and divergences between Mosteller's response and the majority opinion is critical to understanding *Mizenko*. Section V will discuss the court's decisions in the *Mizenko* case. Section VI will discuss the landscape post-*Mizenko*. While the court has made certain aspects of the post-*Crawford* world clear, its decision – and the division on the court – leaves many questions unanswered. Section VI will attempt to illustrate what the court made clear and to delineate what the court left undecided.

II. *Crawford v. Washington* and the Changes to the Confrontation Landscape

In 2004, the United States Supreme Court completely changed the rules relating to the Confrontation Clause and hearsay evidence. For the generation preceding *Crawford v. Washington*, the Court had largely collapsed the Confrontation Clause and hearsay rules. Under the test adopted in *Ohio v. Roberts*\(^5\) in 1980, the Court held that statements of unavailable witnesses could be admitted at trial – and satisfy the Confrontation Clause – if they were reliable.\(^6\) Under the *Roberts* test, statements were reliable if they either met a "firmly rooted hearsay exception" or had "particularized guarantees of trustworthiness."\(^7\) The Court held that satisfaction of the *Roberts* test also satisfied the mandates of the Confrontation Clause.\(^8\) Therefore, if the State could meet the *Roberts* test, out-of-court hearsay statements of unavailable witnesses were admissible and the defendant's right to confront witnesses was deemed to be satisfied.

The *Roberts* test remained the rule until the Supreme Court's decision in *Crawford*. Sylvia Crawford, the defendant's wife, wit-

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6. Id. at 66.
7. Id.
8. Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 Hous. L. Rev. 1003, 1054-59 (2003) (arguing that the Confrontation Clause poses no "meaningful barrier to admission of hearsay evidence" except prior testimony of the witness); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. Rev. 557, 558 (1988) ("The confrontation clause is no longer a constitutional right protecting the accused, but essentially a minor adjunct to evidence law.").
nessed an altercation between her husband and Kenneth Lee. During the altercation, the defendant stabbed Lee. The State charged Crawford with assault in the second degree. Crawford alleged he acted in self-defense. When the prosecution subpoenaed his wife, the defendant prevented Sylvia from testifying by invoking marital privilege. In response, the prosecution offered the custodial tape-recorded statement Sylvia gave to the police implicating the defendant. The trial court admitted the tape recording, finding it had “particular guarantees of trustworthiness.” The Washington Court of Appeals, in a two-to-one decision, reversed Crawford’s conviction after reaching a contrary conclusion as to the trustworthiness of Sylvia’s statement. The Washington Supreme Court reinstated the conviction, determining that Sylvia’s statement was sufficiently trustworthy to satisfy the Confrontation Clause.

When the case reached the United States Supreme Court, the Court refused to decide the case based on Roberts. Instead, the Court elected to sever the generation-old link between the Confrontation Clause and the rules of evidence. Holding that hearsay rules and reliability no longer determine Confrontation Clause issues, the Court elevated the constitutional confrontation issues analysis above the hearsay analysis. The Court held that the sole question for purposes of the Confrontation Clause is whether the defendant has an opportunity to cross-examine the declarant’s testimonial statement.

After Crawford, the admission of a hearsay statement no longer depends on satisfaction of the Roberts test. Rather, the threshold admissibility question is whether the defendant’s confrontation rights have been preserved. The answer to this question depends on whether the statement is “testimonial.”

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10. Id.
11. Id. at 40.
12. Id.
13. Id.
14. Id.
15. Crawford, 541 U.S. at 40.
16. Id. at 41.
17. Id.
18. Id. at 67.
19. Id. at 67-68.
20. Id. at 61. See also Tom Lininger, Prosecuting Batterers After Crawford, 91 VA. L. Rsv. 747, 765 (2005).
Crawford Court clarified that the Confrontation Clause demands that the defendant have an opportunity to cross-examine those making testimonial statements.\textsuperscript{22} Likewise, the Court made clear that nontestimonial statements do not implicate the Sixth Amendment.\textsuperscript{23}

The difficulty of the Crawford decision stems from the Court's refusal to adopt a definition of "testimonial."\textsuperscript{24} The Supreme Court created a rule governing the reach of the Confrontation Clause contingent on the definition of "testimonial" without deciding what the term means.\textsuperscript{25} Significantly, the Court considered three alternative definitions of testimonial and refused to settle on any of the three.\textsuperscript{26} Crawford argued to the Court for a definition of "testimonial" limiting testimonial statements to "ex parte in-court testimony or its functional equivalent."\textsuperscript{27} Falling within this definition are "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially."\textsuperscript{28} In an amicus brief, the National Association of Criminal Defense Lawyers advocated that testimonial statements include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."\textsuperscript{29} Finally, the Court considered a more formal definition of testimonial. The Court cited to the concurrence of Justice Thomas in White v. Illinois,\textsuperscript{30} a case involving admission of child hearsay pertaining to sexual abuse.\textsuperscript{31} This definition equates "testimonial" with "extrajudicial statements. . . . contained in formalized

\textsuperscript{22} Id. at 59.
\textsuperscript{23} Id. at 68.
\textsuperscript{24} Id.
\textsuperscript{26} Crawford, 541 U.S. at 68.
\textsuperscript{27} Id. at 51 (quoting from Brief of Petitioner at 23, Crawford, 541 U.S. 36 (No. 02-9410)). The United States as amicus also asked the Court to adopt this standard. The United States, however, argued against a categorical ban on all testimonial statements, suggesting instead that situations exist justifying the admission of testimonial statements without prior cross-examination if they are particularly reliable. In addition, the United States did not propose that the definition of testimonial statements also include those that the declarant believes will be used in trials.
\textsuperscript{28} Id. at 51.
\textsuperscript{29} Id. at 52 (citing Brief for National Association of Criminal Defense Attorneys et al. as Amici Curiae in Support of Petitioner at 3, Crawford, 541 U.S. 36 (No. 02-9410)).
\textsuperscript{31} Crawford, 541 U.S. at 51-52.
testimonial materials, such as affidavits, depositions, prior testimony, or confessions."\textsuperscript{32} 

The Court, however, did not endorse any of these potential definitions. The Court determined that a more precise definition was not necessary in \textit{Crawford} because Sylvia's statement was the product of a police interrogation and police interrogations satisfy any definition of "testimonial."\textsuperscript{33} While the Court stated that it was "leav[ing] for another day any effort to spell out a comprehensive definition of ‘testimonial’," the Court also stated that, at a minimum, "testimonial" also applies to prior testimony at a preliminary hearing, before a grand jury, or at a former trial.\textsuperscript{34}

While the Court did not define "testimonial," it did demarcate some of the consequences of the testimonial-nontestimonial divide. First and foremost, the Court stated that the defendant must have the opportunity to cross-examine testimonial statements; no other reliability determination will satisfy the Confrontation Clause.\textsuperscript{35} In addition, the Court indicated that admissibility of nontestimonial statements is a matter of state law, including hearsay rules:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does \textit{Roberts}, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.\textsuperscript{36}

Without a precise definition of "testimonial," courts, prosecutors, and defense attorneys across the country have struggled to balance the Court's command to preserve a defendant's confrontation rights with the need of the prosecution to admit evidence necessary for its cases.\textsuperscript{37} As the Montana Supreme Court noted, the "definitional void"\textsuperscript{38} created by the Court in \textit{Crawford} became the immediate problem of state and federal courts throughout the country.

\textsuperscript{32} Id. (citing \textit{White}, 502 U.S. at 365). \textit{See infra} note 55 and accompanying text.
\textsuperscript{33} Id. at 68.
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 61.
\textsuperscript{36} Id. at 68.
\textsuperscript{37} Paul Kyed, Crawford v. Washington: Child Victims of Sex Crimes in Colorado and the United States Supreme Court's Revised Approach to the Confrontation Clause, 82 DENVER U. L. REV. 427, 460 (2004); Kirst, \textit{supra} note 25, at 36 ("[G]aps [in the Crawford opinion] have left other courts to struggle as they try to rebuild confrontation doctrine on Crawford's combination of the testimonial interpretation, original meaning, and history.").

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III. THE SEA OF SCHOLARLY RESPONSE TO CRAWFORD

An outpouring of scholarly commentary immediately followed the Supreme Court's decision in Crawford. Nearly three hundred articles have been written that address the Crawford decision. The commentary ranges from enthusiastic support for the changes in Confrontation Clause law to dire predictions about the future of prosecutions. Many of these articles struggle to answer the lynchpin question of what constitutes a “testimonial” statement.

Approximately five different testimonial “categories” have been created in court decisions and commentator articles, both pre- and post-Crawford. While these categories are often not mutually exclusive and are often employed in concert, it is helpful to isolate them for purposes of discussion. It is also important to recognize that each category represents a different position on the confrontation rights spectrum, ranging from broad to narrow.

The first category, representing the broadest application of the Sixth Amendment right to confront witnesses, is the “accusatory test.” Under this test, any statement that accuses another of a criminal act qualifies as a testimonial statement. One commentator has expressed this definition as “a statement is testimonial if it transmits information for use in litigation.” This is the broadest reading of testimonial because it does not take into account the context in which the statement was made, to whom the statement was made, or the intent of the declarant in making the statement. Without these limitations, the accusatory test provides criminal defendants with expansive confrontation rights because the State must produce the makers of these statements at trial. The accusatory test is essentially a bright-line rule: the

39. See, for example, the entire Volume 71 of the Brooklyn Law Review devoted to Crawford v. Washington.


41. See, e.g., Mosteller, supra note 4; Raeder, supra note 40.

42. This test has not received acceptance by the courts or commentators. I discuss it here more for its theoretical importance.


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State must introduce information only through a live witness who will be subject to cross-examination.45

A second possible approach to testimonial is the "reasonable expectation of the declarant test."46 This test has both objective and subjective approaches.47 Under the objective test, the question is whether a reasonable person in the declarant's position would consider the likelihood of the statement's use at trial.48 The subjective approach, on the other hand, looks at the actual speaker and asks whether that person demonstrated an intent that the statement be used at trial.49 According to one proponent of the "reasonable expectation test":

The subjective approach has the advantage of theoretical simplicity; the objective approach, but not the subjective approach, requires a court to determine both a set of characteristics that it will assume a reasonable person has in this context and a set of criteria defining what it means to be in the declarant's position. The subjective approach is also more intellectually straightforward: It is easier to explain why a statement should be deemed testimonial given that the person who actually made the statement anticipated prosecutorial use than to explain why the statement should be deemed testimonial given that a mythical person who might be quite different from the actual declarant would have anticipated such use.

On the other hand, because it does not entail an inquiry into the actual declarant's state of mind, the objective approach is more likely to yield some categorical rules, and to the extent reasonable rules could be crafted, that would be a welcome development. Not all situations lend themselves to categorical rules, or at least not to simple categorical rules – 911 calls reporting an assault while the assailant is still nearby provide a good example. But some situations do. For example, I believe that a statement describing an assault made after the assailant has left to a police officer responding at the scene should, if an objective test is used, be deemed testimonial as a categorical matter.50

The "reasonable expectation of the declarant" is a narrower reading of testimonial and results in less confrontation protection than the accusatory test. Under this test, the context in which the

45. Id. at 247-48 ("The passage of more than two centuries has not substantially altered our insistence that prosecution witnesses give testimony by one proscribed method – under oath, face-to-face with the accused, and subject to cross-examination.").
47. Friedman, supra note 44, at 253.
49. Friedman, supra note 44, at 253.
50. Id. at 254.
statement was made, to whom the statement was made, and the expectations of the declarant are all relevant factors that must be considered to determine if the statement is testimonial. Because of the number of variables involved, the "reasonable expectation of the declarant" approach is less conducive to bright-line rules, making it more difficult for courts and practitioners to apply.

A third category is the "resemblance" test. Under this approach, statements are testimonial when they resemble the inquisitorial practices in use at the time of the drafting of the Sixth Amendment. As Justice Scalia wrote in *Crawford*:

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

The crux of this test is to determine whether correspondence exists between the production of the statement and the Marian statutes. This approach tends to produce fewer statements that are testimonial. The narrower reading of testimonial results in less breadth for confrontation clause rights.

Another approach to testimonial is to find that statements made in court, or in formal settings that are used in court, are testimonial. This formal definition of testimonial was advocated

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51. *Id.* at 253-54.
52. *See* Brief of Respondent at 8, Hammon v. Indiana, No. 05-5705 (U.S. Feb. 2, 2006) [hereinafter *Hammon* Respondent's Brief]:

The State advocates the following general rule: Extrajudicial statements are "testimonial" only when they resemble the forms of testimony that were produced by the abusive inquisitorial practices that gave rise to the Confrontation Clause. This "resemblance test" sweeps within the meaning of "testimonial" statements all of the forms of extrajudicial statements that characterized the inquisitorial trials of the civil-law practices, the specialty and prerogative court practices, and Marian-statute practices. The modern "testimonial" statements with most resemblance to those historical abuses include affidavits, deposition transcripts, prior-hearing and trial transcripts, grand-jury testimony, and responses to police interrogation.

by Professor Akhil Amar prior to the Crawford decision.\textsuperscript{56} Professor Amar proposed that "witness against" in the Sixth Amendment refers to witnesses actually testifying in court and to materials prepared and presented as evidence in court: videotapes, transcripts, depositions, and affidavits.\textsuperscript{57} As mentioned above, this approach is reflected in Justice Thomas' opinion in White v. Illinois.\textsuperscript{58} Several courts have viewed "testimonial" in this way.\textsuperscript{59} This approach often arrives at similar results as the "resemblance" test, but does not require the historical analysis. The formality approach tends to be an even narrower reading of testimonial and only works to provide defendants confrontation rights when the person is testifying in court or in another similar context.\textsuperscript{60}

A final test to define testimonial statements is the "immediate danger" test.\textsuperscript{61} Essentially, this test excludes from the category of testimonial those statements made to obtain help in stopping an immediate danger. Several courts have used this test to determine that 911 calls are nontestimonial.\textsuperscript{62} This test is different than the other four in that it is not an overarching theory of testimonial; rather, it works to exclude a particular class of statements from being testimonial.\textsuperscript{63}

IV. PROFESSOR MOSTELLER'S ARTICLE

From the flood of law review articles following the Court's decision in Crawford, the majority opinion of the Montana Supreme Court in State v. Mizenko relied heavily on an article authored by Duke University law professor Robert Mosteller entitled, Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses.\textsuperscript{64} In fact, the majority opinion relies exclusively on Mosteller's article, although it departed from it in significant

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\textsuperscript{56} Akhil Reed Amar, The Constitution and Criminal Procedure 129-130 (1997).
\textsuperscript{57} Akhil Reed Amar, Confrontation Clause First Principles: A Reply to Professor Friedman, 86 Geo. L.J. 1045 (1998).
\textsuperscript{58} See supra notes 30-32 and accompanying text.
\textsuperscript{59} See Friedman, supra note 44, at 267 n.54 (collecting cases).
\textsuperscript{60} Mosteller, supra note 4, at 531.
\textsuperscript{61} See Hammon Respondent's Brief, supra note 52, at 13.
\textsuperscript{62} See, e.g., State v. Barnes, 854 A.2d 208, 211 (Me. 2004) (statements by victim upon running into a police station deemed not to be testimonial because "she was not responding to tactically structured police questioning as in Crawford, but was instead seeking safety and aid.").
\textsuperscript{63} This test has been characterized as a "corollary" of the "resemblance test." See Hammon Respondent Brief, supra note 52, at 13.
\textsuperscript{64} Mosteller, supra note 4.
ways. Therefore, an understanding of Mosteller's article is essential to an understanding of *State v. Mizenko*.

In his article, Professor Mosteller advocates for enhanced confrontation rights after *Crawford v. Washington*. He posits definitions of testimonial that draw bright lines for ease of use by courts. Mosteller recognizes that courts will face tremendous pressure to narrow the definition of testimonial to ensure the admission of reliable evidence without confrontation. He also expresses concern that narrow definitions of testimonial will encourage changes in police investigations solely to circumvent the Sixth Amendment. In the face of these pressures, Mosteller favors broad testimonial categories that will ensure broad confrontation rights to defendants through an approach largely akin to the "reasonable expectation of the declarant test." 68

In attempting to create workable rules for "testimonial" statements, Mosteller develops essentially a two-step approach to determine whether a statement is testimonial. The first step is to categorize the statement as accusatory or non-accusatory. Generally speaking, a statement that is not accusatory is not testimonial. If a statement is accusatory, Mosteller moves to the second step: determining whom is the recipient of the statement. Accusatory statements made to government officials are testimonial. Accusatory statements made to private individuals may or may not be testimonial, depending on the recipient and the intent of the declarant. While Mosteller attempts to draw bright lines,

65. Id. at 517.

66. Id.

67. Id. at 513.

68. Some scholars who advocate broad protection of confrontation rights have also advocated a broad reading of forfeiture by wrongdoing as a counterbalance. See Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4 (2004). Rather than broadly applied forfeiture by wrongdoing, Mosteller instead argues for significant reform of the hearsay rules. Mosteller, *supra* note 4, at 519, 520-21. Justice Nelson, on the other hand, argues in his dissent in *Mizenko* that forfeiture by wrongdoing should be read broadly to address the concerns that defendants in domestic violence situations will use threats or violence to prevent victims from testifying. State v. Mizenko, 2006 MT 11, ¶ 45 n.1, 330 Mont. 299, ¶ 45 n.1, 127 P.3d 458, ¶ 45 n.1 (Nelson, J., dissenting). Justice Warner, in contrast, suggests that forfeiture by wrongdoing is not the answer for domestic violence situations because of the difficulty of establishing forfeiture by wrongdoing. *Id.* ¶ 38 (Warner, J., concurring).

69. Mosteller, *supra* note 4, at 544, 547.

70. See *infra* note 81 and accompanying text.


72. See *infra* note 81 and accompanying text.
his approach does not result in categories that are completely mutually exclusive.

Mosteller would have courts determine whether the statement is accusatory or not. While Mosteller never specifically defines "accusatory," he seems to use "accusatory" and "incriminating" interchangeably. In addition, several times he refers to accusatory in relation to what it is not: "That indicator is whether the statement is made for the purpose of accusing, or whether it is made for another purpose associated with other ordinary human activities." Additionally, "[the demeanor of the witness] may be associated with a finding that the statement was made for a purpose other than providing evidence to the authorities about a crime."

Mosteller's approach harkens to mind a Rule of Evidence 404(b)-type analysis. Under Rule 404(b), evidence of prior bad acts by the defendant is not admissible for purposes of propensity – evidence that the defendant did it before is not allowed to show he did it this time. However, if the government can establish some other, non-propensity purpose for the evidence, it is potentially admissible. In a similar fashion, Mosteller says statements that incriminate another in criminal activity are accusatory unless the State can show a separate non-accusatory purpose for the statement.

To explicate his "accusatory versus other purpose" category, Mosteller looks at statements an assault victim might make to a doctor during a post-assault visit. During the visit, the patient may tell the doctor about the assault: "My spouse punched me in the head and threw me down the stairs." Clearly this is a statement that incriminates the victim's spouse in criminal activity.

73. Mosteller, supra note 4, at 542, (using the term "accusatory"), 540 ("On the other hand, statements made to family, friends, and acquaintances without an intention for use at trial have consistently been held not to be testimonial, even if highly incriminating to another.").
74. Id. at 547.
75. Id. at 576.
76. FED. R. EVID. 404(b) states:
Other Crimes, Wrongs, or Acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.
77. Id.
However, if the statement is made to the doctor for the purpose of obtaining medical treatment, it is possible that the statement will still be considered nontestimonial. Mosteller contrasts the statement for purposes of medical treatment with the same statement being made during a doctor's visit for purpose of obtaining a second opinion or producing a report for trial. In the latter scenarios, the statement is simply accusatory and there is not a sufficient alternative purpose to remove the statement from the accusatory category.

If a statement is deemed accusatory, the next major consideration is who hears or receives the statement. The central question is whether the recipient is a government officer or a private citizen. Mosteller draws a bright line that all accusatory statements to government officials are testimonial. Furthermore, Mosteller includes in this category the police and private individuals or organizations performing government functions as government officials. He writes, "Crawford leaves many important issues undecided regarding the scope of its application. These issues can be resolved effectively by making Crawford cover virtually all statements to government officers, except those that are unrelated to crime or clearly made for another purpose." A statement that is "unrelated to crime" or "made for another purpose" would easily fail the first criteria: it would not be accusatory. Therefore, once the first category is met — the statement is accusatory — then all statements to government officials are testimonial.

Interestingly, Mosteller suggests that when the statement is made to a government official, the government should bear the burden of establishing that the statement was made for a non-accusatory purpose. Thus, if the statement is made to the police, the prosecution will have to establish that the statement should still be considered nontestimonial. Mosteller does not suggest any standard of proof for this proposition.

When the recipient is a private individual, Mosteller is not able to draw a bright line rule. Partially, this inability derives from the Crawford decision itself. The Court in Crawford stated

78. Mosteller, supra note 4, at 575 n.335, 602.
79. Id. at 601.
80. Id. at 602.
81. Id. at 577, 623.
82. Id. at 624.
83. Id. at 623.
84. Mosteller, supra note 4, at 544, 572, 624.
85. Id.
that an "overheard, casual remark" is not testimonial, even if accusatory.\textsuperscript{86} Mosteller is also concerned that police departments will be able to circumvent the Sixth Amendment by delegating investigation to private individuals.\textsuperscript{87} Mosteller avoids limiting testimonial to statements made exclusively to government officials because he wants a broad application of the Confrontation Clause. Mosteller hopes to extend confrontation law to protect defendants not only from statements made to the police, but also from some statements made to private individuals.\textsuperscript{88} When the recipient is a private individual, therefore, Mosteller abandons his efforts to draw bright line rules and focuses instead on two issues: (1) the type of private recipient; and (2) whether the declarant has a "testimonial intent."\textsuperscript{89}

Mosteller divides the universe of private individuals into "family, friends, and acquaintances"\textsuperscript{90} and "strangers at arms length from the witness."\textsuperscript{91} Underlying this division is Mosteller's concern with the declarant's intent. Normally, when speaking to a family member, a person intends that the conversation will remain in the family.\textsuperscript{92} When speaking to a stranger, there is no such similar intent.\textsuperscript{93} The primary question in determining the "testimonial intent" is whether the declarant would intend for the statement "to be conveyed beyond those who would be expected to keep it confidential."\textsuperscript{94}

When the recipient of an accusatory statement is a family member or friend, Mosteller seems willing to infer that statement was made absent an intent that it be conveyed to authorities.\textsuperscript{95}

\footnotesize{\textsuperscript{86} Crawford v. Washington, 541 U.S. 36, 51 (2004). \textsuperscript{87} Mosteller, supra note 4, at 544. \textsuperscript{88} Id. \textsuperscript{89} Id. at 544, 572. \textsuperscript{90} Id. at 540. \textsuperscript{91} Id. at 544. \textsuperscript{92} Mosteller, supra note 4, at 623. \textsuperscript{93} Id. \textsuperscript{94} Id. at 544. \textsuperscript{95} Id. at 623, 540 ("On the other hand, statements made to family, friends, and acquaintances without an intention for use at trial have consistently been held not to be testimonial, even if highly incriminatory.").}
However, Mosteller advocates an inquiry into "whether [the statement] was intended to be conveyed to those investigating the crime." If the accusatory nature of the statement or the intent of the speaker is ambiguous, the statement is "excluded from the testimonial category."

Mosteller reaches a different conclusion if a "stranger at arms length" receives the statement. Presumably, with the stranger, the declarant either has an intent that the statement be conveyed to the authorities or at least no intent to keep it confidential. Mosteller does not expressly indicate these inferences. In addition, he does not explain what factors will be important in determining when the declarant intends that the statement be conveyed to authorities, beyond apparently to whom the statement is made.

Regardless of the type of private recipient, Mosteller suggests that when the statement is made to a private person the burden should be placed on the defendant to show that the statement was made for a testimonial purpose. Again, Mosteller does not indicate what standard of proof should apply to the defendant’s burden.

Mosteller’s attempt to simplify the application of Crawford for courts is not as simple as he suggests. Take for instance the situation when a person, shaking and crying, makes a spontaneous statement that her husband just stabbed her with a knife. In pre-Crawford parlance, this would have been referred to as an “excited utterance” and would have been admissible regardless of whether it was made to a family member, neighbor, 911 operator, or responding police officer. Post-Crawford, the issue is whether the statement is testimonial. Using Mosteller’s approach, even the first question is difficult to answer: is the statement accusatory or made for another purpose? Mosteller acknowledges this difficulty when he writes, “An important general consideration is that statements may be made for mixed purposes, and resolving how such statements are to be construed is a key issue.” Unfortunately, Mosteller provides little guidance as to how to resolve this “key issue.” Clearly, the proposed statement is one that is about a crime and which incriminates the victim’s husband. In

96. Id.
97. Id.
98. Mosteller, supra note 4, at 623, 542-43. Mosteller includes strangers at arms length in the category of recipients in whom a declarant could not expect confidentiality, along with government agents and private agencies that perform government functions.
99. Id. at 544, 624.
100. Id. at 575.
these ways, the statement is clearly accusatory. However, it is also possible to construe the statement as a call for assistance, an alerting of a danger, or a desire for medical assistance. In these ways, the statement is non-accusatory and made for some other purpose.

In discussing 911 calls and excited utterances, Mosteller writes:

I have previously argued that as to statements knowingly made to a police officer about a crime, a bright line should be drawn early in the process that treats as testimonial any statement about a crime. . . . The same should be true even as to excited utterances knowingly made to police officers about a crime. There are no clear demarcation lines between different types of statements made in this context, other than a statement made to receive immediate protection or secure medical attention. When not made to police officers, however, statements that are excited utterances constituting the entirety of some 911 calls and parts of others could legitimately be excluded from the testimonial category, both because many are made for these other purposes and because they are not clearly made to police officials who are either investigating a crime or whose unmistakable and primary function is to do so.\(^{101}\)

Thus it appears that the question of whether the statement is accusatory is connected to the type of person who receives the statement. In other words, the statement is accusatory and testimonial when made to a police officer. The same statement might be non-accusatory and nontestimonial when made to a 911 operator.

In addition, it demonstrates that the burden on the state to establish a non-accusatory purpose may be extremely limited. First, Mosteller limits the acceptable alternative purposes to "receiv[ing] immediate protection or secure[ing] medical attention."\(^{102}\) Second, Mosteller later states:

when the statement is made to a government agent or to a private organization exercising government functions, the perspective of the receiver/hearer should also matter. A statement should be treated as testimonial if the government agent as receiver, who does often think of generating testimony, is producing a statement to be used testimonially even if the witness is uncertain as to intent.\(^{103}\)

In other words, Mosteller indicates that even when the declarant has an alternative, non-accusatory intent, the police officer hearing the statement may recognize the "testimonial impor-
tance" of the statement, thereby overriding the non-accusatory purpose of the statement.

Mosteller has attempted to create a straightforward approach for courts to apply when determining whether a statement is testimonial. However, in his desire to expand confrontation protection for defendants, he is unable to formulate bright line rules. The result is a seemingly straightforward approach thwarted by blurred lines and inconsistencies.

V. **STATE v. MIZENKO**

A. **Facts**

In the early afternoon of October 3, 2003, Gregory Mizenko assaulted his wife, Debra, at their home. Debra, breathing heavily and in a cracking and wavering voice, state[d], ‘he hit me, pulled out my hair, knocked me down. I tried so hard not to call, but umm, this is ridiculous. I can't do this anymore.” In addition, Debra told 911 that she wanted Mizenko arrested. In response to the 911 call, Officer Buennemeyer interviewed Debra at the Mizenko home. Officer Buennemeyer saw a bruise on Debra’s cheek. He also noticed

105. Id. at 3.
106. Mizenko, ¶ 3.
107. Id. ¶ 34.
108. Id. ¶ 4.
109. Id. ¶ 3.
110. Id.
111. Id. ¶ 5.
112. Mizenko, ¶ 5.
113. Id. ¶ 6.
114. Id. ¶ 5.
115. Id. ¶ 6.
clumps of hair on the floor in the kitchen and the living room. Debra told Officer Buennemeyer that Mizenko had pulled the clumps of hair out of her head.

B. District Court

The State charged Mizenko with his third offense of Partner or Family Member Assault. The State subpoenaed Debra Mizenko; however, she failed to appear for the trial. During the jury trial, the State elicited testimony from Dawn Grove, Tami King, and Officer Buennemeyer. Through all three witnesses, the State introduced statements of Debra Mizenko. Mizenko objected to each of their testimonies on hearsay grounds, which the district court overruled. Dawn Grove testified that Debra told her that her husband had been drinking and trying to hurt her. Tami King testified that Debra told her that her husband had hit her, knocked her down, and pulled out her hair. Officer Buennemeyer testified that Debra told him that the hair on the floor was hers and that Mizenko had pulled it out. Without objection, the State also played the 911 tape of the conversation between Debra and Tami King.

Debra did not testify and was never subjected to cross-examination on any of the statements she made to Grove, 911 operator King, or Officer Buennemeyer. After the State rested, Mizenko asserted that Debra’s absence violated his confrontation rights. The district court denied the confrontation clause challenge and submitted the case to the jury. The jury found Mizenko guilty as charged.

116. Id.
117. Id.
118. Mizenko, ¶ 1.
119. Id. ¶ 4.
120. Id. ¶ 7.
121. Id.
122. Id. ¶ 4.
123. Id. ¶ 5.
125. Id. ¶ 5.
126. Id. ¶ 7.
127. Id. ("The District Court ruled that Mizenko’s cross-examination of the witnesses who had contact with Debra satisfied his Sixth Amendment right to confrontation.").
128. Id.
C. Appellate Arguments

On appeal, Mizenko raised the single issue that his Sixth Amendment right to confront witnesses was violated when the district court admitted Debra’s hearsay statements. In his appellate briefing, Mizenko did not address the Crawford decision or whether Debra’s statements were testimonial. During oral argument, however, Mizenko argued that testimonial statements are those that are substantive and accusatory—essentially the accusatory test.

In its reply brief, the State argued that Debra’s statements did not fit within the minimal definition of testimonial the Supreme Court discussed in Crawford. Akin to Amar’s formalism approach, the State argued that testimonial statements were limited to “prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations.” Under this definition, the State argued that Debra’s statements to Dawn Grove and to 911 were nontestimonial excited utterances. As to Debra’s statement to Officer Buennemeyer, the State conceded that the statement during police interrogation was likely testimonial. The State argued, however, that even if testimonial, admission of the statement was cumulative and harmless error, citing State v. Van Kirk, because of the proper admission of the nontestimonial statements containing the same information.

The Montana Supreme Court invited amicus briefing from the Montana Association of Criminal Defense Lawyers, the Montana County Attorneys’ Association, and the Montana Coalition Against Domestic and Sexual Violence. The Montana Association of Criminal Defense Lawyers argued that the definition of testimonial for the Sixth Amendment should be synonymous with the definition of testimonial for self-incrimination: testimonial statements “explicitly or implicitly[] relate a factual assertion or disclose information.”

129. Mizenko Appellant’s Brief, supra note 104, at 6-7.
130. Mizenko, ¶ 12. See supra note 42-44 and accompanying text.
131. Brief of Respondent at 10, Mizenko, 2006 MT 11, 330 Mont. 299, 127 P.3d 458 (No. 04-488) [hereinafter Mizenko Respondent’s Brief]; see also Amar, supra note 57.
132. Id. at 12.
133. Id. at 11.
135. Mizenko Respondent’s Brief, supra note 131, at 12.
136. Brief of Amicus Curiae Montana Association of Criminal Defense Lawyers on Appeal from the District Court of the Twelfth Judicial District of Montana in and for Choteau
The Montana County Attorneys' Association ("MCAA") brief discussed some post-<i>Crawford</i> case law and argued that Debra's statements to her neighbor were not testimonial because they were not made to anyone with "an official view of the investigation." The MCAA argued that Debra's statements to 911 were not testimonial because they were not the product of a formal investigation, but were rather a "citizen summon[ing] the government to her aid."

The Coalition against Domestic and Sexual Violence brief made two arguments that Debra's statements were not testimonial. First, they argued that the statements were "made immediately after the assault[,] happened and either to obtain immediate help in ending the assault[,] or in response to law enforcement officer[']s questions at the victim[']s residence[,] in order to determine what happened." Second, the Coalition pointed out that Mizenko presented no evidence that Debra made her statements with the "intent or knowledge" that the statements would be used at trial. The Coalition's argument seemed to be a combination of the "immediate danger" approach to testimonial and a variant of the "reasonable expectation of the declarant" approach.

D. Majority Opinion

In its opinion in <i>Mizenko</i>, the Supreme Court made its first significant effort to define the reach of the Confrontation Clause in Montana and to sound the uncertain waters resulting from the change from <i>Roberts</i> to <i>Crawford</i>. The court began its discussion with a brief overview of the changed landscape after <i>Crawford</i>. According to the majority, hearsay statements are admissible under two scenarios. In the first, the statement is testimonial. The State must establish that the declarant is unavailable for trial and the defendant must have had a prior opportunity to

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137. Amicus Brief of the Montana County Attorneys' Association at 6, <i>Mizenko</i>, 2006 MT 11, 330 Mont. 299, 127 P.3d 458 (No. 04-488).

138. Id. at 6-7 (quoting People v. Corella, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004).


140. Id.

141. See supra notes 46-51, 60-61 and accompanying text.

142. The court considered <i>Crawford</i> briefly in State v. Carter. See McKelvey, supra note 2.

143. <i>Mizenko</i>, ¶¶ 9-10.
cross-examine the declarant.\textsuperscript{144} In the second scenario, the statement is nontestimonial. The State can establish that the statement satisfies \textit{Roberts}.\textsuperscript{145} The majority, therefore, framed the critical issue as whether the statement is testimonial.\textsuperscript{146}

In determining what testimonial means, the court quoted from the definition of testimony expressed in \textit{Crawford}: “a solemn declaration or affirmation \textit{made for the purpose of establishing or proving some fact}.”\textsuperscript{147} The court then considered and rejected Mizenko’s accusatory test as the definition of testimonial.\textsuperscript{148} The court determined that the accusatory test is “overly broad” and in conflict with explicit language from \textit{Crawford} that excluded “off-hand” accusatory remarks from the ranks of testimonial because they bear “little resemblance to the civil-law abuses the Confrontation Clause targeted.”\textsuperscript{149}

Relying heavily on Professor Mosteller, the court isolated two concerns underlying the Confrontation Clause: prosecutorial misconduct and declarant misuse of the criminal justice system.\textsuperscript{150} Quoting Mosteller, the court stated that prosecutorial misconduct can arise from either “government[al] manipulation of the witness in creating the evidence” or “governmental manipulation of the recording of the statement.”\textsuperscript{151} Again citing Mosteller, the majority found that declarants can abuse the system “in order to punish, to exact revenge on, or to shift the blame to the defendant.”\textsuperscript{152} According to the majority, the proper remedy against either prosecutorial misconduct or declarant abuse is cross-examination of the declarant.\textsuperscript{153}

Next, the majority quoted language from \textit{Crawford} indicating that a “casual remark to an acquaintance” is not a testimonial statement.\textsuperscript{154} Although it is possible to read this specific language

\begin{itemize}
\item \textsuperscript{144} Id. \textbar 10.
\item \textsuperscript{145} Id.
\item \textsuperscript{146} Id. \textbar 2.
\item \textsuperscript{147} Id. \textbar 11.
\item \textsuperscript{148} Id. \textbar 12.
\item \textsuperscript{149} Mizenko, \textbar 12.
\item \textsuperscript{150} Id. \textbar 15-16.
\item \textsuperscript{151} Id. \textbar 15.
\item \textsuperscript{152} Id. \textbar 16.
\item \textsuperscript{153} Id. \textbar 15-16.
\item \textsuperscript{154} Id. \textbar 17. The actual quote from \textit{Crawford} is:
\begin{quote}
An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
\end{quote}
\end{itemize}
from *Crawford* as imposing a formality requirement,\(^\text{155}\) the Montana Supreme Court elected to read the language as requiring an exploration of the state of mind of the declarant:

The word "casual," rather than modifying the setting in which the declarant made the statement, modifies the declarant's assumption as to what use, if any, the listener might make of the statement. When an objective declarant would reasonably expect the state to use her statements at trial, the Sixth Amendment demands that courts exclude such statements absent an opportunity for confrontation.\(^\text{156}\)

From the definition of "testimony" and the discussion of "casual," the majority derived an intent requirement for testimonial statements.\(^\text{157}\)

While not expressly stated, it appears the majority opinion's definition of testimonial statements are those statements that implicate the two concerns underlying the Confrontation Clause. The concerns about prosecutorial misconduct and declarant abuse are implicated when the declarant has the expectation that the state will use the statement at trial.\(^\text{158}\) To a large extent, the majority adopted Mosteller's version of the "reasonable expectation of the declarant" test discussed above.\(^\text{159}\) Of critical importance, the majority elected the objective, rather than the subjective, form of the test.\(^\text{160}\)

The majority proceeded to address a variety of scenarios and discuss the application of its rule. First, the court noted that a declarant should reasonably expect his or her statements will be used at trial when the declarant speaks to a government agent, signs an affidavit, or makes a recorded statement.\(^\text{161}\) In contrast, the declarant may not have a reasonable expectation that the statements will be used at trial when speaking to a private person, or when "alerting law enforcement of imminent and immediate danger."\(^\text{162}\) Referring specifically to 911 calls, the court determined that the reasonable expectation of the declarant derives

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\(^\text{155}\) For a discussion of a "formality" approach to testimonial, see *supra* notes 55-60 and accompanying text.

\(^\text{156}\) *Mizenko*, ¶ 17.

\(^\text{157}\) *Id.*

\(^\text{158}\) *Id.* ¶ 18.

\(^\text{159}\) *Id.* ¶ 23 n.3.

\(^\text{160}\) *Id.* For a discussion of the differences between a subjective and objective reasonable expectation test, see *supra* notes 46-49 and accompanying text.

\(^\text{161}\) *Id.* ¶¶ 18-19.

\(^\text{162}\) *Mizenko*, ¶¶ 20-21.
from the content of the statements made to 911 and the circumstances surrounding the call being made.\textsuperscript{163}

The court then appeared to reaffirm its holding in \textit{State v. Carter} that foundational hearsay that is "not substantive evidence of a particular offense" is not testimonial.\textsuperscript{164} Interestingly, the court stated that foundational statements can be nontestimonial even when the declarant has the reasonable expectation that the statement could be used in court.\textsuperscript{165}

The court summarized its position on testimonial in the following paragraph:

Bringing together these rationales, generally, when a declarant knowingly speaks to a police officer or governmental agent, her statements are presumed testimonial. If, however, the declarant had objective reason to believe that her statement would serve only to avert or mitigate an imminent or immediate danger and the agent who received the statement had no intent to create evidence, the statement is presumed to be nontestimonial. Alternatively, unless the declarant had clear reason to believe that the statement would be used in court as substantive evidence against the defendant, her statements to a non-governmental agent are nontestimonial.\textsuperscript{166}

In an enlightening footnote, the court acknowledged that its testimonial approach is similar to Professor Mosteller's, although the court chose to use an "objective reason to believe" standard as opposed to Mosteller's "declarant's intent" approach.\textsuperscript{167} In addition, the court references Mosteller's approach of fluid presumptions and burdens of proof depending on whom the declarant makes the statement to:

We note that this approach, in addition to being relatively easy to apply, approximates that proposed by Professor Mosteller, whereby different burdens apply depending on whom the declarant speaks to: the defendant must show that a statement made to a private individual was clearly or exclusively intended to be testimonial; or the prosecution must show that a statement made to a government agent was intended by the declarant only for a non-testimonial purpose and that the government agent who received the

\textsuperscript{163} \textit{Id.} \textsuperscript{¶} 20.
\textsuperscript{164} \textit{Id.} \textsuperscript{¶} 22.
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.} \textsuperscript{¶} 23. Interestingly, in the government agent context, the court's formulation appears to contemplate the states of mind of two different parties: the declarant and the recipient. The court clearly identifies that the declarant is to be examined from an objective perspective. The court does not indicate, however, the perspective of the government agent. From the language used by the court—"government agent intended"—it appears to be a subjective perspective.
\textsuperscript{167} \textit{Id.} \textsuperscript{¶} 23 n.3.
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statement was not producing a statement to be used prosecutorially.\textsuperscript{168}

After announcing its approach to testimonial statements, the Montana Supreme Court turned to the statements that Debra Mizenko made to her neighbor, the 911 operator, and the responding police officer. The court did not address whether the statements to the 911 operator and the responding officer were testimonial because the defendant failed to object to the playing of the 911 tape.\textsuperscript{169} Since the 911 tape contained the substance of the statements Debra made to the 911 operator and the responding officer, the court found that, even if objectionable, the admission of the statements Debra made to the 911 operator and the officer were cumulative, thus harmless error.\textsuperscript{170}

The court, therefore, only applied its testimonial approach to the statements Debra made to her neighbor. Citing Mosteller, the court determined that while speaking to her neighbor, Debra was speaking to a non-governmental agent.\textsuperscript{171} As such, the majority found that Debra had "no objective reason to believe or anticipate that her statement would be used in court."\textsuperscript{172} The court explained that the "most reasonable construction" was that Debra was placing her appearance, both personal and actual, into context when she stated that her husband had been drinking and was trying to harm her.\textsuperscript{173} Further, according to the court, Debra's statement was merely sharing the "burden" of a traumatic incident and seeking solace.\textsuperscript{174} Alternatively, the court stated that her statement could "fairly be characterized as primarily a cry for help."\textsuperscript{175} In determining that Debra did not have a reasonable belief that her statement would be used in court, the court placed particular significance on the fact that Debra did not provide as detailed a statement to her neighbor as she later supplied to the 911 operator. If she had been trying to create evidence, Debra would have included more details about the incident to her neigh-

\textsuperscript{168} Mizenko, ¶ 23 n.3.
\textsuperscript{169} Id. ¶ 26.
\textsuperscript{170} Id.
\textsuperscript{171} Id. ¶ 27.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Mizenko, ¶ 27.
\textsuperscript{175} Id.
Accordingly, the court concluded that Debra's statement to her neighbor was not testimonial.\(^{177}\)

In support of its conclusion regarding Debra's statement to her neighbor, the majority cited to numerous decisions of other state courts that have found declarants possess no reasonable belief that similar statements will be used in court.\(^{178}\) Interestingly, the state court decisions involved statements to a wide variety of private individuals: family members (spouses, children, parents, siblings, cousins), acquaintances (friends, neighbors, gang members), and medical personnel (paramedics, nurses, nurse practitioners, doctors).\(^{179}\)

Once the court held that Debra's statement was nontestimonial, admission of the statement did not invoke the Confrontation Clause. The court determined that the admissibility of nontestimonial hearsay is still governed by the Roberts test, which requires the statement to fit within a firmly rooted hearsay exception or bear other guarantees of trustworthiness.\(^{180}\) The court found that Debra's statement to her neighbor fit within the firmly rooted excited utterance hearsay exception.\(^{181}\)

**E. Concurrence**

Justice Warner authored a brief concurrence, largely to respond to the breadth of the dissent's testimonial definition.\(^{182}\) Justice Warner disagreed with the dissent's suggestion that the Confrontation Clause applies to both testimonial and nontestimonial hearsay.\(^{183}\) In addition, Justice Warner contended that the dissent's position would negatively impact the criminal justice system and fail to adequately protect victims and witnesses.\(^{184}\) Justice Warner wrote,

> [A]n accused must not be allowed to hide behind the Constitution by intimidating witnesses. It would be naïve to assume that defendants would not do so, if given the opportunity. It takes little imagination to picture the jungle of fear that would be created if the rationale that is proposed by the dissent is adopted. In my view it would

\(^{176}\) Id.  
\(^{177}\) Id.  
\(^{178}\) Id. ¶ 30 (collecting sources).  
\(^{179}\) Id. ¶ 30.  
\(^{180}\) Id. ¶ 31-32.  
\(^{181}\) Id. ¶ 33.  
\(^{182}\) Id. ¶ 34 (Warner, J., concurring).  
\(^{183}\) Id. ¶ 37.  
\(^{184}\) Id. ¶ 38.
become intolerably more dangerous to be the victim of an offense, or to be a witness in any criminal case, if the Confrontation Clause is interpreted to mean that prosecutions cannot be maintained if witnesses, for whatever reason, do not appear at trial, which is what the dissent seems to advocate.

The Court's opinion today provides for fair trials of the accused while giving consideration to victims and witnesses. Conversely, the dissent’s objective of protecting the accused to the utmost extent, while perhaps well intentioned, fails to adequately consider how such an interpretation of the Confrontation Clause would impede our pursuit of truth and justice in an imperfect world.

F. Dissent

In a lengthy opinion, Justice Nelson, joined by Justice Cotter, dissented from the majority. The dissent began its exegesis by clearly identifying what it considered to be at stake: the ability of the State to continue to prosecute victimless domestic violence cases. According to the dissent, “there will be no compelling reason for victims of Partner or Family Member Assault to testify at the trials of their alleged abusers.” In fact, the dissent contended that the State will actually advise its victims that they need not testify and will go so far as to not subpoena potentially difficult and recanting victims in domestic violence cases. The dissent clearly read the majority’s definition of testimonial as allowing for continued victimless domestic violence prosecutions, built largely on statements to neighbors, 911 calls, and statements to medical personnel. It is this philosophical difference that marked the starting point for the dissent’s vehement disagreement with the majority and which guided the dissent’s interpretive approach throughout its opinion.

185. Id. ¶¶ 38, 43.
186. Mizenko, ¶ 45 (Nelson, J., dissenting). Victimless prosecution describes a prosecution in which the domestic violence victim never testifies in the prosecution’s case. The term is misleading in that there is a victim to the offense; she simply does not physically appear in court. Some prosecutors prefer the term “evidence-based” in an effort to recognize that an actual person has been victimized, and that the prosecution is appropriate because of the evidence supporting it. I use the term victimless to focus the Confrontation Clause concern with unavailable victims.
188. Mizenko, ¶ 46 (Nelson, J., dissenting).
189. Id. ¶¶ 44-48.
190. Id. ¶ 44.
191. See also Justice Nelson’s dissent in Paoni: “I do not agree and will continue to disagree with the whole concept of ‘victimless’ prosecutions.” State v. Paoni, 2006 MT 26, ¶
Justice Nelson offered a unique interpretation of what the United States Supreme Court did in Crawford, which led him to disagree with the majority on several counts. First, he identified different policies underlying the Confrontation Clause. Second, he developed a different definition of testimonial. Finally, he expressed his belief that the excited utterance hearsay exception did not survive Crawford. According to Justice Nelson, the majority's misreading of the Crawford case resulted in the majority creating an unworkable definition of testimonial that significantly undervalues the Confrontation Clause rights of defendants.\textsuperscript{192}

Justice Nelson's concern about the proper breadth of confrontation lead him to issue what can only be seen as an invitation to the defense bar to raise confrontation issues under Article II, Section 24 of the Montana Constitution as opposed to the Sixth Amendment of the United States Constitution.\textsuperscript{193} Justice Nelson laments that Mizenko did not allege a violation of his Montana Constitutional right to confront witnesses.\textsuperscript{194} In fact, neither party raised, briefed, or discussed Article II, Section 24. Justice Nelson, however, opined that Article II, Section 24 provides criminal defendants greater protection and right to confront witnesses than its federal counterpart.\textsuperscript{195}

Justice Nelson then turned to the issue actually raised in the appeal: whether the defendant's right to confront witnesses was violated after Crawford. He began with an extensive discussion of the Crawford case and the right to confrontation.\textsuperscript{196} From this discussion of the Crawford decision, Justice Nelson made three primary conclusions: first, the Confrontation Clause embodies the Founder's concern about the practice of \textit{ex parte} civil examina-

\textsuperscript{42} 331 Mont. 86, ¶ 42, 128 P.3d 1040, ¶ 42. Interestingly, however, Justice Nelson concurs in the decision in \textit{Paoni} that there was sufficient evidence to support the jury's guilty verdict. Given that the jury found the defendant guilty beyond a reasonable doubt without the victim's testimony, and the court, including Justice Nelson, found sufficient evidence to support the jury's determination, it is interesting for Justice Nelson to take such a categorical stance against victimless prosecutions. \textit{Id.} ¶ 41.
\textsuperscript{192} \textit{Mizenko}, ¶ 49 (Nelson, J., dissenting).
\textsuperscript{193} \textit{Id.} ¶¶ 57-59.
\textsuperscript{194} \textit{Id.} ¶ 56.

\textsuperscript{195} \textit{Id.} ¶ 57.
\textsuperscript{196} \textit{Id.} ¶¶ 60-68.
tions; second, the proper definition of testimonial should reflect one of the three formulations of testimonial articulated by the Court to "provide[] guidance" to lower courts; and third, the Court rejected Roberts as the proper test for admission of either testimonial or nontestimonial statements.

1. Concerns Underlying the Confrontation Clause

Justice Nelson concluded that the Confrontation Clause was primarily designed to combat the evil of civil ex parte evidence gathering:

Stated more generally, the substance of the evil at which the Confrontation Clause was directed is the inequity and inaccuracy inherent in a system of criminal procedure which precludes an accused from challenging the reliability of the State's evidence through meaningful confrontation and permits the State to convict a person on the basis of testimony given extrajudicially.

This conclusion is directly at odds with the majority's interpretation of the Confrontation Clause. The majority contends that the Confrontation Clause was designed to check overzealous prosecutors and to stem abuse of the system by witnesses. According to Justice Nelson, the majority's focus on these two concerns is not historically accurate. Justice Nelson contends that the two concerns identified by the majority are merely "byproducts of the civil-law system which the Confrontation Clause rejects." According to Justice Nelson, the misidentification of the concerns embodied in the Confrontation Clause led to the majority's development of a flawed definition of testimonial which "fails to fully safeguard an accused."

2. Crawford Formulation Guides Testimonial

Interestingly, Justice Nelson's lengthy discussion of the Crawford case leads him to a unique reading of the Supreme Court's decision. According to Justice Nelson, the United States Supreme Court in Crawford sought to provide "guidance" to lower courts as to the proper determination of what constitutes a testi-

197. Id. ¶ 64.
198. Mizenko, ¶ 70.
199. Id. ¶ 63.
200. Id. ¶ 83.
201. Id. ¶¶ 15-16 (majority opinion).
202. Id. ¶ 106 (Nelson, J., dissenting).
203. Id.
monial statement by providing three "formulations" of testimonial. Justice Nelson quotes the following language from the Crawford opinion: "These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it." The Crawford Court did not adopt any of the three formulations because the statement at issue in that case derived from police interrogation. The Court considered statements produced during police interrogation to fall into the "core" of the Confrontation Clause regardless of which formulation was used.

While most courts and commentators have identified that the "formulations" were the various positions offered by the parties and amici in Crawford and that the Court expressly refused to endorse any of the three, Justice Nelson takes from this discussion in Crawford a command that the definition of testimonial resemble one of the three formulations articulated by the Crawford Court. Accordingly, Justice Nelson disagrees with the definition of testimonial adopted by the majority because it "bears little resemblance to the formulations set forth by the Supreme Court in Crawford." Justice Nelson argues that a statement is testimonial when a declarant makes it "under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." He asserts his test is superior to the majority's because it is "suggested" by the Court in Crawford and "resembles Crawford's third formulation."

Justice Nelson disparaged the majority's definition of testimonial for several reasons. First, he contended that the test is so ambiguous as to provide no guidance to district courts. Further, the lack of precision in the test guarantees that any decision a district court makes as to testimonial will be affirmed. Finally, the test itself is unworkable and internally inconsistent.

204. Mizenko, ¶ 70.
205. Id. (quoting Crawford v. Washington, 541 U.S. 36, 52 (2004)).
206. See supra text accompanying notes 33-34.
207. Crawford, 541 U.S. at 52-57.
208. Mizenko, ¶ 70 (Nelson, J., dissenting). According to Justice Nelson, it is necessary to determine "whether Debra's statements fall within that formulation." Id.
209. Id. ¶ 100.
210. Id. ¶ 70 (quoting Brief of Amici Curiae National Association of Criminal Defense Attorneys et al. in Support of Petitioner, supra note 29, at 3.)
211. Id. ¶ 89 n.26.
212. Id. ¶ 97.
213. Id.
According to Justice Nelson, the majority asserts that their testimonial formulation is an objective test. He contends, however, that any claimed objectivity is destroyed by the court's own reference to subjective considerations:

Yet, the majority's reference to what an "objective" or "reasonable" declarant "would expect" and what a declarant "should reasonably expect" are rendered ambiguous at best by the majority's ultimate conclusion that "testimonial" depends on subjective considerations: the declarant's belief, her knowledge of the official capacity of the person to whom she was speaking and his intent to create evidence, and her understanding of the substantive use of hearsay statements at trial. 214

Justice Nelson contends that the majority's test (which he dubs a "belief/knowledge/purpose test") is no more definitive than the Roberts test and is equally disparaging of the Confrontation Clause. 215

3. Rejection of Roberts for All Purposes

Justice Nelson's reading of the Supreme Court's rejection of Roberts is also unique and leads him to assert the excited utterance hearsay exception is no longer viable. 216 In Crawford, the Court clearly overruled the Roberts test for determining the extent of the defendant's confrontation rights. 217 Roberts stated that a defendant's confrontation rights were not implicated when a statement of a non-testifying person was admitted at trial, so long as the statement was reliable. 218 According to Roberts, a statement was reliable when it fell within either a firmly rooted hearsay exception or had other particular guarantees of trustworthiness. 219 In Crawford, for purposes of protecting a defendant's confrontation rights, the Supreme Court clearly replaced Roberts with cross-examination. In this context, the only historically accurate reliability determination is an opportunity to cross-examine the makers of testimonial statements. 220 Importantly, the Supreme Court stated:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their de-

214. Mizenko, ¶ 111.
215. Id. ¶ 114.
216. Id. ¶ 54.
220. Crawford, 541 U.S. at 68.
Development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.\footnote{221}{Id.}

Despite the above language from Crawford, Justice Nelson argues that the right of confrontation applies to both testimonial and nontestimonial statements.\footnote{222}{State v. Mizenko, 2006 MT 11, ¶ 158, 330 Mont. 299, ¶ 158, 127 P.3d 458, ¶ 158 (Nelson, J., dissenting).} According to Justice Nelson, when the Crawford Court overturned Roberts, the Court was rejecting “multi-factored reliability and trustworthiness balancing” tests as they relate to the admission of hearsay statements.\footnote{223}{Id. ¶ 54.} As he states, “[i]t follows, therefore, that hearsay evidence grounded in the excited utterance exception is inadmissible (for the purpose of establishing the truth of the matter asserted) after Crawford for the simple reason that the Court rejected the underpinnings of that exception—guarantees of trustworthiness.”\footnote{224}{Id. ¶ 155.} Justice Nelson, therefore, attacks the majority for its continued adherence to the Roberts test, for its use of Roberts as to admissibility of nontestimonial statements, and its affirming of the excited utterance hearsay exception. Justice Nelson suggests that Crawford’s discussion as to the unpredictability of the Roberts test should, at a minimum, cause society to “reexamine our comfort level” with the excited utterance hearsay exception.\footnote{225}{Id. ¶ 163.}

VI. WHAT DOES IT ALL MEAN?

As the first significant opportunity to explore the transformation from Roberts to Crawford, the Montana Supreme Court’s decision in Mizenko clearly represents the beginning of a long case-by-case development of confrontation law.\footnote{226}{This is particularly true given the court's determination of the standard of review. See infra note 261 and accompanying text.} As the first in this series of future cases, the Mizenko decision cannot be expected to answer all relevant questions surrounding post-Crawford enhanced confrontation rights. In assessing the court’s decision in Mizenko, it is helpful to delineate what the decision makes clear and what it leaves unanswered. This should allow some insight into what to expect in the future.
A. What Is Clear After Mizenko

In determining what the court made clear in Mizenko, it is critical to keep in mind the procedural posture of the case. First, the defendant alleged a violation of his confrontation rights under the Sixth Amendment of the United States Constitution.227 The court followed United States Supreme Court Sixth Amendment precedent — namely Crawford — and acknowledged the transformation in the confrontation landscape from hearsay exceptions to cross-examination for testimonial statements.228 Therefore, when a defendant asserts a violation of his federal confrontation rights, the court will follow federal law. This is significant because it clarified that the threshold question is the formulation of testimonial. Even though Justice Nelson invites defense counsel to allege violations of Montana confrontation rights, it seems clear that the threshold question under either state or federal law will be the testimonial formulation.229

The Montana Supreme Court, of course, will have the opportunity to diverge from the federal baseline and develop Article II, Section 24 on “adequate and independent state grounds.”230 Whether the court elects this option may depend on the direction the United States Supreme Court takes in further developing federal confrontation law.231 For now, it is clear that the Montana Supreme Court is in sync with the United States Supreme Court.

Second, it is important to keep in mind that the Mizenko court actually decided very little. Due to the procedural posture, the single issue before the court was whether the victim's statement to her neighbor was testimonial.232 A majority of the court answered that question in the negative, finding the statement to be nontestimonial.233 The court very clearly held that nontestimonial hearsay may be admissible if it satisfies the Roberts test by

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228. Id. ¶¶ 9-10 (majority opinion).
229. Id. ¶ 2.
230. See Michigan v. Long, 463 U.S. 1032, 1042 (1983) (the Supreme Court has appellate jurisdiction over state court resolutions of federal constitutional questions unless it is "clear from the opinion itself" that the state court's decision rested on an adequate and independent state ground that would preclude Supreme Court review).
231. The United States Supreme Court has heard argument on 911 calls and statements to responding officers but has yet to issue its opinion. See Davis v. Washington, No. 05-5224 (U.S. argued Feb. 27, 2006) and Hammon v. Indiana, No. 05-5705 (U.S. argued Feb. 27, 2006). A decision in these cases might propel the Montana Supreme Court to consider developing Article II, Section 24.
233. Id. ¶ 27.
falling into either a firmly rooted hearsay exception or bearing particular guarantees of trustworthiness. In keeping with the limited question before the court, the victim's statement to her neighbor was admissible because it was an excited utterance. The excited utterance hearsay exception is firmly rooted in Montana and the availability of the declarant at trial is immaterial.

The court's determination that the statement to a neighbor was nontestimonial was based on its articulation of what constitutes a testimonial statement. The court's general formulation is that a statement is testimonial "when an objective declarant would reasonably expect the state to use her statements at trial." The court relied primarily on the "reasonable expectation of the declarant" testimonial formulation of Professor Mosteller. This reliance is interesting because neither the parties nor the amici referenced Professor Mosteller. Also, the court makes several significant deviations from Mosteller's formulation.

In keeping with Professor Mosteller, the court appeared to try to fashion workable testimonial rules. The first aspect of these rules is that a testimonial statement seems to be one that implicates both of the concerns the court identified as underlying the Confrontation Clause: overzealous prosecutors and declarant's abuse of the system. Apparently, if one of the concerns is missing, the statement will fall outside the testimonial category. For instance, the fact that a statement is made to a non-government agent removes the concern of the declarant abusing the system. The statement, therefore, will be nontestimonial.

The second aspect of these workable rules is the government agent/non-government agent split. According to the court, statements to government agents are generally going to be testimonial; statements to non-government agents will usually be nontestimonial. Importantly, the court makes two significant modifications to this rule, one departing from Mosteller and one relying on his theories. Departing from Mosteller, the court significantly broadened the non-governmental agent category. In his divisions, Mosteller identifies statements to government agents as testimonial and statements to private individuals as nontestimonial. However, as to the private individuals, Mosteller asks an addi-

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234. Id. ¶ 10, 31.
236. Mizenko, ¶ 17.
237. Id. ¶ 23.
tional question: did the declarant intend the hearer to maintain confidence? When the private individual is a family member or close friend, the answer is generally yes and the statement remains nontestimonial.238 However, when the private individual is a "stranger at arms length" from the declarant, the answer is no and the statement becomes testimonial.239 Essentially, Mosteller moves the stranger at arms length from the non-government agent to the government agent category.240

The Montana Supreme Court did not follow suit. In Mizenko, the neighbor to whom the victim made her statement was clearly a "stranger at arms length." The court, however, found her to be a non-government agent and the victim's statement to her to be nontestimonial.241 The Montana Supreme Court's non-government agent category is broader than Mosteller's. This departure from Mosteller becomes particularly significant when coupled with the numerous cases cited by the court that find statements to non-government agents to be nontestimonial. The cases involved a wide variety of private persons: family members (including spouses, children, parents, siblings, and cousins), acquaintances (including friends, neighbors, and fellow gang members), and medical personnel (including paramedics, nurses, nurse practitioners, and doctors).242

While creating a broader non-government agent category, the court recognized that there could be specific situations that do not fit the bright-line government agent/non-government agent split. For this reason, borrowing largely from Mosteller, the court modified the test to make the categories rebuttable presumptions.243 This modification allows for more flexibility, but also injects greater uncertainty.

The court also clearly affirmed the post-Crawford viability of victimless domestic violence prosecutions. Prior to Crawford, prosecutor's offices responded to the dynamics of domestic violence, which keeps many victims from testifying in court, by presenting cases without the victim's testimony.244}

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238. See supra notes 90-97 and accompanying text.
239. Mosteller, supra note 4, at 544.
240. Id.
241. Mizenko, ¶ 27. "Given that she was in distress and addressing a non-governmental agent, her neighbor, she has no objective reason to believe or anticipate that her statement would be used in court." Id.
242. Id. ¶ 30.
243. Id. ¶ 23 n.3.
244. King-Ries, supra note 187, at 305-08.
were built largely on the victim's statements to medical personnel and excited utterances to private persons, police officers, and 911 operators. In Mizenko, the county attorney convicted the defendant without the testimony of the victim. In affirming his conviction, the court re-established that victimless prosecutions do not violate a defendant’s confrontation rights, at least in so far as the prosecution relies on a victim’s excited utterance to a neighbor or other non-government person. As discussed above, the court seems willing to consider a broad reading of non-government agent. The possibility, therefore, remains open to prosecutors to pursue this important avenue in society's efforts to combat domestic violence.

**B. Unanswered Questions and Future Battlegrounds**

While the court clarified many issues, its first foray into the post-Crawford universe left many questions unanswered. As stated earlier, most of these will need to be worked out in future cases. I will touch on them briefly because unanswered questions become future battlegrounds.

As discussed above, the court affirmed one of the tools of victimless domestic violence prosecutions: excited utterances. The court did not need to reach the other main tools of victimless domestic violence prosecutions: excited utterances to 911 operators and responding officers, and statements to medical personnel. Even though it did not need to reach the issues, the court's opinion contained language relating to both 911 calls and statements to medical personnel. The court stated that a declarant's statement "alerting law enforcement of imminent and immediate danger" may fall outside the testimonial formulation. However, as to 911 calls specifically, the court stated that the reasonable expectation of the declarant will be determined from the content of the statements made to 911 and the circumstances surrounding the call being made. The full impact of Crawford on victimless domestic violence prosecutions in Montana will not be realized until either the United States Supreme Court or the Montana Supreme Court decides these remaining areas. An examination of these re-

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245. Id. at 301.
246. Id. at 312-13.
248. Id.
maining areas using the majority’s approach suggests some possible resolutions and highlights some difficulties with the approach.

In determining that the excited utterance to a neighbor was nontestimonial, the court appears to have found that neither of the concerns underlying the Confrontation Clause was present. This may not be the case with excited utterances to police officers. With statements to police officers, there may not be a concern about the declarant trying to abuse the system by creating evidence. If the statement is truly an excited utterance, the objectively reasonable declarant has not had time to reflect or contemplate its use at a future trial; rather, the objective declarant is reacting to the stress of the startling situation.249 The concern about prosecutor misconduct, however, is present. The police officer might be able to manipulate the witness, but certainly the officer can manipulate the manner in which the statement is recorded.250

The court did not provide express guidance on how to resolve this situation. It would seem that when one of the underlying concerns is missing, the statement would be nontestimonial. However, the court indicated that “knowing” statements to government officials are presumed testimonial.251 The court might consider excited utterances to not be “knowing” statements to law enforcement. Since excited utterances are statements made without reflection, it is possible, though not probable, to construe the statement in this manner. More likely, the court would consider the statement to be knowingly made and presumptively testimonial. The testimonial presumption can be overcome when the declarant had objective reasons to believe she was summoning aid and the recipient of the call for help had no intent to create evidence.252 This will be a factual determination that will pose significant difficulty for the courts. The district courts will need to examine the expectation of a reasonable person in the declarant’s shoes. The court recognized that a declarant can have subjective expectations that contrast with the objective factors.253 As Mosteller noted, these determinations become challenging and complex.254

250. See supra notes 158, 201 and accompanying text.
251. Mizenko, ¶ 23.
252. Id.
253. Id. ¶ 27. (“To the extent that the statement can be construed in any other manner, it is fairly characterized as primarily a cry for help.” Id. (emphasis added)).
254. See supra note 103 and accompanying text.
In addition, the district court will need to examine the intent of the police officer. It will be an unusual situation that an officer had no intent to create evidence. This portion of the test suggests that as to the responding officer, the State will not be able to rebut the presumption that the excited utterances are testimonial.

Considering whether 911 calls are testimonial, it is arguable that both underlying concerns are present. Certainly the possibility for declarant abuse of the system exists. Prosecutorial misconduct is somewhat more tenuous since the conversations between 911 operators and callers are recorded. There still remains a slight possibility that the 911 operator is manipulating the caller into creating evidence.

The court's language relating to 911 calls also highlights difficulties with the court's objective test. Take for instance the situation when a victim calls 911 and tells the operator that the defendant is assaulting her. This seems to fall within the "alerting law enforcement of imminent and immediate danger" and should be nontestimonial. However, the determination that the statement is nontestimonial will depend on the rest of the conversation. There are three main possibilities. First, the victim can say, "I want the defendant to go to jail." This seems to be contemplating prosecution and would likely make the earlier statement testimonial.

Second, the victim can tell 911 that she does not want the defendant to go to jail or is afraid of the defendant going to jail. This statement seems to recognize the possibility that the State would be contemplating prosecution. As such, it seems likely to be testimonial. Finally, the victim can say nothing else. In that case, the court is unable to tell if the victim is contemplating prosecution or not, and the victim's statement would probably remain nontestimonial.

Some of this will depend on how strictly the court construes the objective nature of the test and how willing the court is to recognize its "primary" intent implications. If the court is willing to consider that objectively the 911 caller may "primarily" need assistance while secondarily is aware of the possibility of prosecu-

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256. See Mosteller, supra note 4, at 537 (discussing People v. Vigil, 104 P.3d 258, 262-63 (Colo. Ct. App. 2004) (holding that seven-year-old reasonably expected prosecutorial use of statement when he told police officer that defendant "should go to jail").
258. Mizenko, ¶ 27; see supra notes 249, 253 and accompanying text.
tion, then there exists a greater possibility that 911 calls will be construed as nontestimonial.

As to statements to medical personnel, it seems clearest that the court will consider these statements to be nontestimonial. First, this scenario seems closest to the issue actually decided in Mizenko. Second, neither of the two underlying concerns is implicated when the declarant is seeking initial medical treatment. Third, the court cited a series of cases in which statements to medical personnel were considered nontestimonial. These reasons strongly suggest that these statements would be nontestimonial.

In addition to the unresolved questions pertaining to the scope of possible victimless prosecutions, the court left unanswered several other intriguing questions. The first pertains to the court's testimonial and nontestimonial rebuttable presumptions. The court does not articulate what quantum of evidence tips the balance from one to the other. At one point, the court suggests the standard might be a "clear reason to believe." At another point, the court frames it as an "objective reason to believe" standard. This question was not at issue in Mizenko and the court provided no further guidance. The answer to this may depend on whether "testimonial" is conceived as an evidentiary rule or constitutional right. If the former, it would suggest a preponderance of the evidence standard consistent with other evidence rules. If the latter, it would be more appropriate to have a higher standard than preponderance of the evidence. It is also possible to conceive different tests depending on whether the State or the defendant has the burden.

Akin to this discussion is the question surrounding the standard of review. The court indicated that it will review evidentiary determinations for an abuse of discretion. The court also indicated that "[t]here is no discretion, however, in properly interpreting the Sixth Amendment." For Confrontation Clause issues, therefore, the court stated that they will engage in de novo review. The question will be whether the district court's attempt to apply the majority's test will be considered an evidentiary ruling that will be assessed as an abuse of discretion or as "interpreting the Sixth Amendment" which will be reviewed de novo. The

259. Id. ¶ 23.
260. Id.
261. Id. ¶ 8.
262. Id.
263. Id.
determination of what a reasonable person in the declarant’s position would expect seems to be largely fact driven, particularly in those situations in which there are primary and secondary intents. As factual determinations, they seem to fit more properly in the abuse of discretion standard. Arguably, however, the determination of what a reasonable person would do could be a determination of law. If Justice Nelson correctly assessed the level of difficulty of application of the majority’s test, the standard of review question could determine whether the Montana Supreme Court or the district courts develop Montana confrontation law.

Another major battleground is the standard for admission of testimonial statements. The court made clear the admission of nontestimonial hearsay depends on satisfaction of the Roberts test. The court, however, did not address whether the hearsay rules continue to apply statements determined to be testimonial. Since the court found that the victim’s statement to her neighbor was nontestimonial, the court did not need to reach this issue. Interestingly, the Court in Crawford seemed to suggest that this is an open question:

Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . It is therefore irrelevant that the reliability of some out-of-court statements "cannot be replicated, even if the declarant testifies to the same matters in court." The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

While the Supreme Court declared that the Confrontation Clause does not impose any constraints on the admissibility of the statement, the hearsay rules may still be applicable.

Finally, it is unclear how closely the nontestimonial statement category will track the hearsay exceptions. All hearsay exceptions are built on the premise that the declarant’s statement is reliable because the declarant is not contemplating trial; rather, the declarant is reacting to the situation at hand — as with excited utterances — or is in a situation that creates a compelling reason to be truthful — as when seeking medical treatment from a doctor. These situations have been embodied into the hearsay rules because we, as a society, have determined that they are situations in which it is objectively reasonable to consider the statements relia-

ble. In other words, it is reasonable to view the statements as reliable precisely because the primary intent of the declarant is not trial-centric. Rather, the declarant's primary intent is unconnected to accusation, evidence-gathering, or prosecution. There seems to be, therefore, great similarity in result between the Roberts test and the court's objective declarant's reasonable expectation test.

A strong argument could be made that if a statement satisfies a hearsay exception, it would also be a situation in which the objective declarant is not reasonably expecting the state to use her statement at trial. The statement, therefore, would be admissible because its nontestimonial nature would remove the Confrontation Clause bar and its satisfaction of Roberts would remove its hearsay bar.

At first glance, this seems completely contrary to Crawford. Surely the United States Supreme Court envisioned more when it severed confrontation from the evidence rules than the same result under a different analysis. I think that this would be a cribbed view of both Crawford and Mizenko. The congruence between Crawford and Roberts only exists when the recipient of the statement is a non-government agent or in the limited situation in which the recipient is a government agent and the declarant is calling for immediate assistance and that call for help satisfies one of the firmly rooted hearsay exceptions. Mizenko, therefore, recognizes Crawford's sea-change in confrontation rights, particularly in those situations in which the state has an active role and intent to produce evidence for prosecutions. Mizenko also recognizes, however, the hundreds of years of collective wisdom regarding human nature behind the development of the hearsay rules.

VII. Conclusion

As a first step into the post-Crawford waters, the Montana Supreme Court has done two somewhat contradictory things. First, the court has enhanced the confrontation rights of criminal defendants. Second, the court has preserved the possibility of victimless domestic violence prosecutions, in at least a limited fashion. The court's carefully crafted testimonial definition allows for the coexistence of these competing realities. While the success of the Montana Supreme Court's efforts will not be fully realized for many years, the fact that the court has recognized these two important and potentially conflicting goals bodes well for the future.