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State v. Carter: Rejecting Crawford v. Washington's Third Formulation as a Per Se Definition of Testimonial

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NOTE

STATE V. CARTER: REJECTING *CRAWFORD V. WASHINGTON'S* THIRD FORMULATION AS A PER SE DEFINITION OF TESTIMONIAL

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I. INTRODUCTION

On March 8, 2004, the United States Supreme Court decided *Crawford v. Washington*.[1] The Court held that allowing testimonial statements from unavailable declarants violates the Confrontation Clause[2] of the United States Constitution.[3] The *Crawford* Court named four categories of evidence that are *per se* testimonial,[4] and gave lower courts three formulations to use in defining testimonial evidence.[5] However, for the most part, the Court left the definition of testimonial, and the adoption or rejection of the formulations, open to lower court determination.[6]

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1. Crawford v. Washington, 541 U.S. 36 (2004).

2. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

3. *Crawford*, 541 U.S. at 68-69.

4. "Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68.

5. "Various formulations of this core class of 'testimonial' statements exist: '*ex parte* in-court testimony or its functional equivalent . . .'; 'extrajudicial statements . . . contained in formalized testimonial materials . . .'; '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' . . . ." *Id.* at 51-52 (citations omitted).

6. *Id.* at 68.

In *State v. Carter*,[7] the Montana Supreme Court had its first opportunity to adopt or reject the third formulation supplied by the *Crawford* Court. The third formulation, taken from the Brief for the National Association of Criminal Defense Lawyers ("NACDL"), suggests that any statement made by a person who knows or has reason to believe the statement might be used at trial is testimonial and cannot be used in court.[8] In *Carter*, the court addressed whether a certification report for a breathalyzer, prepared in large part for use at trial, constitutes a testimonial out-of-court statement.[9]

The Montana Supreme Court found the report was not testimonial.[10] The court thus declined to universally adopt *Crawford's* third formulation of testimonial. In doing so, the court rejected a potentially dangerous blanket definition of testimonial in favor of a case-by-case approach.[11] Unfortunately, the Montana Supreme Court obscured the *Crawford* testimonial analysis by adding a confrontation analysis from *State v. Delaney*.[12] The additional confrontation analysis, when combined with the substantive and accusatory analysis, suggests the court might at some point find that all substantive or accusatory statements are testimonial. If the court chooses this path, the court will have essentially adopted the third formulation from *Crawford,* and all such statements identifying criminal behavior will be withheld from the fact-finder.

Section II of this note examines *Crawford* and relevant Montana cases decided before *Crawford*. Section III describes the facts, holding and reasoning in *Carter*. Section IV analyzes the Montana Supreme Court's opinion in relation to *Crawford* and *Delaney*, and addresses implications of *Carter*.

7. 2005 MT 87, 326 Mont. 427, 114 P.3d 1001.

8. The third formulation reads: "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." *Crawford*, 541 U.S. at 52 (citing Brief of National Association of Criminal Defense Lawyers et al. as Amici Curiae supporting Petitioner, at 3, *Crawford*, 541 U.S. 36 [hereinafter NACDL Brief]).

9. *Carter*, ¶ 29.

10. *Id.* ¶ 32.

11. *See infra* Section IV.

12. State v. Delaney, 1999 MT 317, ¶ 18, 297 Mont. 263, ¶ 18, 991 P.2d 461, ¶ 18.

II. BACKGROUND

A. Crawford v. Washington

In *Crawford v. Washington*, the United States Supreme Court took a fresh look at the Confrontation Clause interpretation created two decades earlier in *Ohio v. Roberts*.[13] *Roberts* established that evidence from an unavailable witness could be admitted if the statement bore sufficient "indicia of reliability."[14] After *Roberts,* evidence was reliable if it fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness.[15]

The *Crawford* Court abrogated the *Roberts* test, and created a new standard. In this case, Michael Crawford ("Crawford") was charged with assault and attempted murder for stabbing Kenneth Lee.[16] Immediately after the incident, Crawford's wife, Sylvia, allowed police to tape-record her statement that she had not seen any weapons in Lee's hands.[17] At trial, Crawford claimed self-defense, and invoked his state marital privilege to prevent Sylvia from testifying.[18] The State then sought admission of Sylvia's tape-recorded statement since Sylvia would not be available to testify. Crawford objected to admission of the recording, asserting it would violate his confrontation right as provided by the Sixth Amendment of the Constitution.[19]

The district court, the Washington Court of Appeals, and the Washington Supreme Court applied the *Roberts* test to determine if the statement bore adequate indicia of reliability. The district court allowed the evidence, finding it bore particularized guarantees of trustworthiness.[20] The court of appeals reversed, holding the statement failed the nine-factor test used to determine guar-

13. Ohio v. Roberts, 448 U.S. 56 (1980).

14. *Id.* at 66.

15. *Id.* Consider for example if the state sought to admit a call to 911 in which the alleged victim stated that the defendant was assaulting him or her. The defendant would likely object on hearsay and Confrontation Clause grounds. The Confrontation Clause objection, under *Roberts*, would likely be overruled because the statement fell under the firmly established excited utterance hearsay exception.

16. Crawford v. Washington, 541 U.S. 36, 40 (2004).

17. *Id.* at 39.

18. *Id.* at 40.

19. *Id.*

20. The trial court found the statement to be trustworthy in part because Sylvia had witnessed the event recently, and her statement was made to a neutral officer. *Id.*

antees of trustworthiness.[21] The Washington Supreme Court reinstated the conviction. This court found the statement "interlocked" with the defendant's statement, thus guaranteeing trustworthiness.[22]

The United States Supreme Court reversed and remanded *Crawford*.[23] Justice Scalia, writing for the majority, noted that each of the lower courts had interpreted the *Roberts* test for particularized guarantees of trustworthiness differently. The Court denounced the *Roberts* test based on its potential to admit statements prohibited by the Confrontation Clause.[24] The Court rejected a general reliability exception for out-of-court statements made by unavailable witnesses, adopting instead a bright line rule: the Confrontation Clause forbids testimonial statements by unavailable declarants.[25]

The Court chose to "leave for another day" the definition of testimonial.[26] However, the Court did offer lower courts some guidance. Four types of statements "at a minimum" are testimonial: grand jury, preliminary hearing testimony, former trial testimony, and statements resulting from police interrogations.[27]

The Court also provided a conceptual framework for courts to use when determining if statements are testimonial. The framework consists of three formulations which "share a common nucleus and then define the Clause's coverage at various levels of abstraction."[28] One formulation is *ex parte* in-court testimony that the declarant could expect would be used at trial, and the defendant was unable to cross-examine the declarant. Another formulation includes formalized testimonial materials such as confessions and depositions.[29] The last formulation, taken from the brief for the NACDL, includes statements made under circum-

21. Sylvia's statement failed the Washington Court of Appeals' test in part because Sylvia made the statement while answering officers' directed questions, and she had earlier told officers a different story. *Id.* at 41.

22. The Washington Supreme Court held that Sylvia's statement did bear particularized guarantees of trustworthiness. Sylvia's statements were nearly identical to Crawford's statements; therefore, they were trustworthy because they "interlocked." *Crawford*, 541 U.S. at 40 (referring to State v. Crawford, 54 P.3d 656, 663 (Wash. 2002)).

23. *Id.* at 69.

24. *Id.* at 65.

25. *Id.* at 68.

26. *Id.*

27. *Id.* at 68.

28. *Crawford*, 541 U.S. at 52.

29. *Id.*

stances leading the declarants to believe the statements might be used at trial.[30]

B. *Relevant Montana Cases Prior to* Crawford v. Washington

Two Montana cases provide the background for the holding in *Carter*: *State v. Clark*[31] and *State v. Delaney*.[32]

1. State v. Clark

In *State v. Clark*, the Montana Supreme Court engaged in a Confrontation Clause analysis of a hearsay statement. Ronald Clark was charged with possession of dangerous drugs.[33] The State filed a notice of intent to admit a Montana state crime laboratory report containing a chemical analysis of the drugs taken from the defendant at the time of arrest.[34] The State asserted that Montana Rule of Evidence 803(8) allows the report to be admitted without testimony of the author. Rule 803(8) reads: "written reports from the Montana state crime laboratory are within this exception to the hearsay rule."[35]

Clark filed a written objection to the evidence, stating the admission would violate his right to cross-examine witnesses against him.[36] The Montana Supreme Court held that Rule 803(8), insofar as it does not require the author of Montana state crime laboratory reports to testify, violates Montana's Confrontation Clause.[37] As part of its analysis, the court determined that the chemical analysis contained in the laboratory report was a "critical component" of proving the offense against the defendant.[38] Therefore, Clark had the right, based on the Montana Constitution's Confrontation Clause, to confront the author of the report.[39] The court remanded the case for a new trial.[40]

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30. *Id.* (quoting from NACDL Brief, *supra* note 8, at 3).
31. 1998 MT 221, 290 Mont. 479, 964 P.2d 766.
32. 1999 MT 317, 297 Mont. 263, 991 P.2d 461.
33. *Clark*, ¶¶ 7-8.
34. *Id.* ¶ 9.
35. MONT. R. EVID. 803(8).
36. *Clark*, ¶ 9.
37. *Id.* ¶ 25.
38. *Id.* ¶ 24.
39. MONT. CONST. art. II, § 24 (stating that the accused has the right "to meet the witnesses against him face to face").
40. *Clark*, ¶ 34. Interestingly, the Montana Supreme Court Commission on Rules of Evidence has not changed Rule 803(8) since the *Clark* ruling. *See also* Nicholas J.

2. State v. Delaney

The court clarified the holding in *Clark* one year later when it decided *State v. Delaney*.[41] Robert Delaney was charged and convicted in the Lewis and Clark County Justice Court for driving under the influence of alcohol.[42] He appealed to the district court.[43] Before his district court trial, Delaney asked the State to certify that the Intoxilizer 5000 breath machine used to measure his blood alcohol content had been performing correctly.[44] The State provided Delaney with State crime laboratory certification forms.[45]

On the first day of trial, Delaney made a motion *in limine* to prohibit the State from admitting the results of the Intoxilizer test.[46] Delaney made a hearsay objection because the author of the certification form was not going to testify.[47] Delaney argued the form could not lay the necessary foundation to admit the test results.[48] Furthermore, Delaney contended that the holding in *Clark* required the author of the certification report to appear in court to testify. Otherwise, admission of the report would violate his Confrontation Clause right.[49]

The State argued that it intended to offer the report merely as foundation for the test results, and did not intend to offer it into evidence.[50] The court agreed, and distinguished the case from *Clark*.[51] In *Clark,* the crime laboratory report was substantive because the report itself was needed to prove the offense. Furthermore, the information contained in the *Clark* report was accusatory because it had the potential to prove the offense.[52]

On the other hand, in *Delaney,* the State did not need the annual certification report to prove the offense, but rather needed it only to provide foundation for the substantive evidence. Because

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Weilhammer, *Face to Face: The Crime Lab Exception of Rule 803(8) of the Montana Rules of Evidence and the Montana Confrontation Clause*, 60 MONT. L. REV. 167 (1999).

41. *Delaney*, 1999 MT 317, 297 Mont. 263, 991 P.2d 461.
42. *Id.* ¶ 3.
43. *Id.*
44. *Id.* ¶¶ 8-9.
45. *Id.* ¶ 9.
46. *Id.* ¶ 4.
47. *Delaney,* ¶ 10.
48. *Id.*
49. *Id.* ¶ 17.
50. *Id.* ¶ 12.
51. *Id.* ¶ 18 (referring to State v. Clark, 1998 MT 221, ¶ 24, 290 Mont. 479, ¶ 24, 964 P.2d 766, ¶ 24).
52. *Id.*

the certification report was foundational and "the information . . . was not accusatory in the same manner as the chemical analysis in *Clark*," the report was allowed in.[53] The Montana Supreme Court affirmed the district court's ruling.[54]

III. *STATE V. CARTER*

A. The Facts

On May 14, 2002, Zane Carter made a sharp U-turn near a group of pedestrians in Great Falls.[55] Two police officers stopped Carter and asked him to step out of the car. The officers then noticed Carter smelled of alcohol. Officer Armstrong asked Carter to perform field sobriety tests, which Carter failed.[56] Carter then willingly submitted to a breath alcohol test. Officer Armstrong performed the test with an Intoxilizer 5000 machine. Carter's breath test result showed a blood alcohol content of 0.210.[57]

Carter was tried in Cascade County Justice Court in July 2002. He was found guilty of three misdemeanor offenses: driving under the influence, failure to carry insurance, and driving with a suspended license.[58]

Carter appealed to the district court. During his jury trial on May 29, 2003, the State called Officer Armstrong to testify. He stated Carter had submitted to a breath test, the result of which was recorded by the Intoxilizer 5000.[59]

Deputy Leasure, one of the police officers responsible for calibrating the Intoxilizer 5000, took the stand for the State.[60] He offered two weekly certification reports indicating the machine had been properly calibrated at the time of Carter's arrest.[61] Deputy Leasure had written one of the reports. The other report was written by Deputy Weinheimer.[62] Carter objected to Deputy

53. *Delaney*, ¶ 18.

54. *Id.* ¶ 21.

55. Brief of Appellant at 3, *Carter*, 2005 MT 87, 326 Mont. 427, 114 P.3d 1001 (No. 03-563).

56. *Id.*

57. *Id.* at 4; Brief of Respondent at 2, *Carter*, 2005 MT 87, 326 Mont. 427, 114 P.3d 1001 (No. 03-563).

58. Brief of Respondent, *supra* note 57, at 1.

59. Brief of Appellant, *supra* note 55, at 3-4.

60. *Id.*

61. Brief of Respondent, *supra* note 57, at 4.

62. *Id.*

Leasure's testimony about Deputy Weinheimer's actions as hearsay.[63]

Deputy Leasure founded part of his testimony on a yearly certification report authored by the Montana state crime laboratory. Carter objected to the yearly certification report as hearsay because its author was not present.[64] The court overruled Carter's objections and admitted the three certification reports.[65]

The jury found Carter guilty of DUI and failure to carry insurance on May 29, 2003. Carter was sentenced on June 6, 2003. On June 19, 2003, Carter filed an appeal to the Montana Supreme Court, asserting the district court had ruled incorrectly on the hearsay objections.[66]

Before the Montana Supreme Court decided Carter's appeal, the United States Supreme Court decided *Crawford.* Carter then abandoned his hearsay argument in favor of a new argument on appeal: the admission of the certification records violated his Confrontation Clause right.[67]

B. Holding

The Montana Supreme Court affirmed the district court's ruling to admit the certification reports.[68] The court first determined it could hear the case despite the fact Carter raised a new theory on appeal.[69] The court then held the information contained in the certification reports was non-substantive and nontestimonial. Therefore, the district court properly admitted the reports.[70] Justice Nelson wrote the majority opinion in which Justices Cotter, Regnier and Warner concurred, with Justice Leaphart specially concurring.

Chief Justice Gray wrote a dissenting opinion, joined by Justice Rice. Chief Justice Gray argued the court should not have heard the case because Carter waited until his appeal to raise a Confrontation Clause objection. Regardless of *Crawford,* Chief

63. Brief of Appellant, *supra* note 55, at 4.

64. Brief of Respondent, *supra* note 57, at 5.

65. *Id.*

66. *Id.* at 1-3.

67. Brief of Appellant, *supra* note 55, at 5.

68. State v. Carter, 2005 MT 87, ¶ 35, 326 Mont. 427, ¶ 35, 114 P.3d 1001, ¶ 35.

69. *Id.* ¶¶ 10-19; Brief of Respondent, *supra* note 57, at 1-3; Brief of Appellant, *supra* note 55, at 5.

70. *Carter,* ¶¶ 20-34.

Justice Gray argued that a Confrontation Clause objection had been available to Carter at the time of trial.[71]

C. *Reasoning*

The majority opinion stated three reasons it could hear the case, despite Carter raising a new issue on appeal.[72] First, *Crawford* was decided after Carter's district court trial. Therefore, Carter's only opportunity to raise a Confrontation Clause argument based specifically on the *Crawford* decision was on appeal.[73] Second, Carter alleged an evidentiary error affecting his substantial rights, namely his right to confrontation.[74] Third, the issue was one of broad public concern, and deciding the issue could stave off future unnecessary litigation.[75]

Having determined it could hear the case, the Montana Supreme Court noted the *Crawford* Court adopted only four core types of statements as testimonial.[76] Also, while the *Crawford* Court proffered three additional formulations for defining testimonial, it did not adopt any of those additional formulations.[77] The Montana Supreme Court followed the same course. Specifically, the court held that statements falling outside the four core testimonial statements were not *per se* testimonial.[78]

The court applied the analysis from *Delaney* to the certification records. In *Delaney*, the court determined that certification records for breath machines are foundational instead of substantive.[79] Therefore, the court held that, because the reports were not substantive or accusatory, they were nontestimonial and could be admitted.[80]

IV. ANALYSIS

The *Carter* court concluded that non-substantive and non-accusatory certification reports, provided as foundation for substan-

71. *Id.* ¶ 41.
72. *Id.* ¶¶ 10-19.
73. *Id.* ¶ 15.
74. *See id.* ¶ 13.
75. *Id.* ¶ 17.
76. *Carter*, ¶¶ 30-32; *see supra* note 4.
77. *Carter*, ¶¶ 30-32; *see supra* note 5.
78. *Carter*, ¶ 31.
79. 1999 MT 317, ¶ 18, 297 Mont. 263, ¶ 18, 991 P.2d 461, ¶ 18.
80. *Carter*, ¶¶ 31-32, 34. For additional information on how other courts have analyzed similar cases, *see* William J. Haddad, Crawford, *Breathalyzer Tests, and the Public-Records Hearsay Exception*, 93 ILL. B.J. 412 (2005).

tive evidence, are not testimonial. To reach its conclusion, the *Carter* court blended a *Crawford* analysis with the holding in *Delaney*. The following sections discuss the benefits and costs of the court's analysis.

A. *Rejecting the Third* Crawford *Formulation as a* Per Se *Definition of Testimonial*

Crawford determined that statements falling within a "core class" of testimonial evidence implicate the Confrontation Clause.[81] The core class includes statements made as prior testimony at preliminary hearings, grand jury hearings, former trials, and police interrogations. *Crawford* also provided three formulations which can be used to define the Clause's reach.[82] *Crawford* did not expressly adopt any of the three formulations, leaving that option open to the states.[83]

The NACDL Brief provided the *Crawford* court with the third formulation of testimonial: any statement made by a person who reasonably believed it might be used in a later trial.[84] The third formulation was also articulated in the Brief Amicus Curiae of Law Professors ("Law Professor Brief").[85] Adopting the third formulation creates an expansive definition of testimonial that excludes several types of statements currently allowed through hearsay exceptions. A closer look at the NACDL Brief and Law Professor Brief offers insight into the broader purpose of that formulation.

The third formulation specifically prohibits two types of statements commonly used in criminal cases. The first is a statement from a witness to a crime to "a friend knowing that the friend will subsequently contact police. Such a statement is aimed at law enforcement and would therefore be testimonial."[86] Currently, such statements may be admitted via the excited utterance hearsay exception.[87]

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81. Crawford v. Washington, 541 U.S. 36, 51 (2004).

82. *Id.* at 51-52; *see supra* note 5.

83. *Crawford*, 451 U.S. at 68.

84. NACDL Brief, *supra* note 8, at 3.

85. Brief Amicus Curiae of Law Professors Sherman J. Clark et al. in Support of Petitioner at 7-8, *Crawford*, 541 U.S. 36 (No. 02-9410) [hereinafter Law Professor Brief].

86. NACDL Brief, *supra* note 8, at 25.

87. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1178-79 (2002).

The second type of statement that could be prohibited by the third formulation is a call made to 911.[88] The NACDL Brief stated that 911 is "both a component of our law enforcement system (suggesting that statements to 911 are testimonial) and an emergency response system (suggesting that statements to 911 are not testimonial)."[89] Therefore, each 911 call could be testimonial "depend[ing] on which capacity the caller was using when contacting the system."[90] Courts often admit tape-recorded 911 calls through the excited utterance hearsay exception, especially when the witness recants his or her testimony or fails to appear at trial.[91]

The Law Professor Brief made similar intimations. Specifically, this brief suggested that "[a] statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made directly to the authorities or not."[92] This broad definition of testimonial would apply to 911 calls, statements to authorities, and statements made to people who are not authorities.

Both the NACDL Brief and the Law Professor Brief refer to the University of Pennsylvania Law Review article *Dial-In Testimony,* the original source of the third formulation.[93] In *Dial-In Testimony,* the authors suggest, based on anecdotal research,[94] "most 911 callers know . . . that by making the call they are practically ensuring that the other person will be arrested, and that a criminal prosecution will probably follow."[95] Therefore, the authors argue, most 911 calls are testimonial.[96] In "occasional cases" when a victim is calling for help, his or her statements cannot be used to prove the truth of what he or she asserts.[97] In other words, if a victim calls 911 to say she needs help because her boyfriend is beating her, the statement cannot be used in court to prove that he was beating her.[98]

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88. NACDL Brief, *supra* note 8, at 25.
89. *Id.*
90. *Id.*
91. Friedman & McCormack, *supra* note 87, at 1175-76, 1178-79.
92. Law Professor Brief, *supra* note 85, at 21 (citing Richard D. Friedman, *Confrontation: The Search for Basic Principles,* 86 GEO. L.J. 1011, 1040-43 (1998)).
93. Friedman & McCormack, *supra* note 87, at 1240-41.
94. *Id.* at 1195-98.
95. *Id.* at 1199.
96. *Id.* at 1193-95.
97. *Id.* at 1242.
98. *Id.* at 1243, n.284.

As articulated by the amici curiae, the third formulation precludes the admittance of 911 calls in most domestic violence cases. *Dial-In Testimony* offers an example of a domestic violence victim who contacted 911 because her husband tried to stab her with a knife.[99] She chose not to testify at trial.[100] Under the third formulation, her 911 call would probably be inadmissible. Even if it was deemed a call for help, it could not be used to prove her husband was trying to stab her with a knife.[101] Thus, the third formulation has the potential to profoundly alter prosecutions in states that adopt it. Since *Crawford* was decided, some state[102] and federal courts have adopted the third formulation of testimonial.[103] Also, the United States Supreme Court has recently granted certiorari on two Confrontation Clause cases addressing the third formulation.[104]

Montana chose not to adopt the third formulation as a *per se* definition of testimonial, despite the opportunity to do so in *Carter*.[105] Carter argued that the third formulation defined testimonial statements.[106] Therefore, the certification reports, which had been prepared by people reasonably expecting the reports to be used at trial, were testimonial.[107] By refusing to accept Carter's argument, the court forestalled the *Crawford* amici's hopes, keeping open the possibility that 911 calls, statements to

99. Friedman & McCormack, *supra* note 87, at 1173-74.

100. *Id.* at 1173.

101. *Id.* at 1243, n.284.

102. *See, e.g.,* In re E.H., 823 N.E.2d 1029, 1035-36 (Ill. App. Ct. 2005) (statements made by young children about a sexual assault were testimonial because they are made to accuse the defendant); State v. Powers, 99 P.3d 1262, 1266 (Wash. Ct. App. 2004) (911 call reporting a restraining order violation was testimonial because victim had not been harmed recently and call was made to ask police to arrest defendant); Lopez v. State, 888 So.2d 693, 700 (Fla. Dist. Ct. App. 2004) (statement by kidnapping victim was testimonial because it was made when police responded to a formal report).

103. *See, e.g.,* United States v. Hinton, 423 F.3d 355, 361 (3d Cir. 2005) (statement identifying assailant made while aiding police in a search for assailant is testimonial under the third formulation); United States v. Cromer, 389 F.3d 662, 673, 677-78 (6th Cir. 2004) (statement made by a confidential informant met the standard set in the third formulation in *Crawford* because a "statement made knowingly to the authorities that describes criminal activity is almost always testimonial"); United States v. Massino, 319 F. Supp. 2d 295, 298-99 (E.D.N.Y. 2004) (holding that co-defendant guilty pleas are testimonial because, in part, the third formulation's functionality requires that the accused be able to confront the declarer of an inherently reliable statement).

104. State v. Davis, 111 P.3d 844 (Wash. 2005), *cert. granted*, 126 S. Ct. 547 (2005), *to be argued in tandem with* Hammon v. State, 829 N.E. 2d 444 (Ind. 2005), *cert. granted*, 126 S. Ct. 547 (2005).

105. State v. Carter, 2005 MT 87, ¶ 32, 326 Mont. 427, ¶ 32, 114 P.3d 1001, ¶ 32.

106. *Id.* ¶ 29.

107. *Id.*

friends, and other similar forms of evidence can continue to be admitted through hearsay exceptions in Montana's courts.

B. *Referring to* Delaney *to Define Testimonial*

In *Carter*, "[t]he State argue[d] the reports used at Carter's trial are nontestimonial evidence because they do not fall within the core group of statements which the Confrontation Clause was meant to address."[108] The court agreed with the State's argument. Unfortunately, the court then proceeded with an analysis of *Delaney,* eventually determining the reports were nontestimonial because *Delaney* had found certification reports were non-substantive and non-accusatory.[109] In using *Delaney's* reasoning to determine what constitutes testimonial, the court confused an otherwise straightforward issue.

The court could have determined the reports were nontestimonial simply because they did not fall within one of *Crawford's* four definitions of testimonial. Alternatively, the court could have developed a rationale for why the reports were nontestimonial, thus articulating the reasoning it will use in future cases.

Instead, the court looked at the Confrontation Clause analysis in *Delaney.* There, the defendant's Confrontation Clause right was not implicated because the certification reports were non-substantive and non-accusatory. The *Carter* court held that, "in the same way that the defendant's confrontation right was not implicated in *Delaney,* Carter's confrontation right was not implicated by the use of these certification reports."[110]

By using Confrontation Clause reasoning from a case prior to *Crawford*, the Montana Supreme Court gave little indication how future cases involving out-of-court statements will be analyzed. Specifically, *Carter* gives little guidance to Montana courts as to the testimonial nature of 911 calls, statements to authorities, and statements to people who are not authorities.[111]

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108. *Id.* ¶ 32.

109. *Id.*

110. *Id.*

111. Since this article was written, the Montana Supreme Court has decided State v. Mizenko, 2006 MT 11, 330 Mont. 299, 127 P.3d 458, and State v. Paoni, 2006 MT 26, 331 Mont. 86, 128 P.3d 1040. *Mizenko* involved three statements by Debra Mizenko. First, Debra told her neighbor that her husband tried to hurt her after he had been drinking. Second, Debra called 911 and told the dispatcher that her husband had hurt her. Third, an officer saw hair on the floor of the house, and Debra told him it was her hair. The Montana Supreme Court did not address whether the statements to the 911 operator or the police officer were testimonial because they were cumulative and harmless error. The court de-

Based on *Carter*, the court will have to look at its own precedent for cases in which a defendant alleges a statement violated his or her Confrontation Clause right. If no such precedent exists, it remains possible that, based on *Carter*, the court could decide that *because* a statement or 911 call is substantive and accusatory, it cannot be admitted.[112]

C. Implications

Carter indicates the direction the court will likely take in future testimonial cases. First, the court may adopt verbatim the four types of statements that the *Crawford* Court designated as testimonial. Second, the court does not intend to adopt the formulations provided in *Crawford* as *per se* definitions of testimonial. Third, the court will continue to hold that certification reports are nontestimonial because they are foundational, not substantive or accusatory.

Unfortunately, the *Carter* decision fails to resolve two important issues regarding future testimonial cases. First, the *Carter* decision relied heavily on a pre-*Crawford* case dealing with a Confrontation Clause assertion and the same type of statement. Because the court relied on a Confrontation Clause analysis from a previous case, it is unclear how the court will determine what is testimonial in future cases where there is no precedent with a Confrontation Clause analysis.

The second and more disconcerting concern arises from the court's holding that the reports were nontestimonial precisely because they were not substantive or accusatory.[113] If the court views this decision to mean that all substantive or accusatory statements are testimonial, the court will in essence have adopted

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termined that Debra's statement to her neighbor was not testimonial because the circumstances indicated Debra did not think the statement would be used in prosecution. *Mizenko*, ¶¶ 25-27. In *Paoni*, Joseph Paoni struck his brother with a rifle butt. Paoni's girlfriend and his brother told a 911 operator Paoni had struck his brother in the face with a rifle butt. *Paoni*, ¶ 6. The brother also told a responding officer that Paoni struck him in the face with a rifle butt. *Id.* ¶ 11. The brother did not testify at trial. *Id.* ¶ 8 The officer testified at trial, and the prosecution admitted the 911 tape into evidence. Paoni largely did not object to the evidence. *Id.* ¶¶ 18-19. Again, the court did not address whether the statements to the 911 operator or police officer were testimonial because they were cumulative and harmless error. *Id.* ¶ 29. Thus, the court left open the issue of 911 calls and statements to authorities, and indicated it will analyze statements to people who are not authorities using some version of the third formulation.

112. This was precisely the argument used in *Mizenko*, and the court found this argument was overly broad. *Mizenko*, ¶ 12.

113. *See supra* note 112.

the third formulation from *Crawford* after all. The result of such a decision will be that any statement to any person identifying criminal behavior will be testimonial and will never be presented to the fact-finder.

V. Conclusion

The Montana Supreme Court had an opportunity in *Carter* to adopt, wholesale, the third formulation proposed in *Crawford*. The court rejected this analysis. In doing so, the court also had an opportunity to resolve for Montana lawyers how the court will determine what is testimonial in the future. Unfortunately, the court missed this opportunity in two ways. First, the court relied on a pre-*Crawford* decision to determine whether a statement was testimonial. Second, the court concluded that non-substantive and non-accusatory reports were not testimonial. This analysis leaves open an argument that accusatory statements are testimonial, an argument similar to the one put forth by the amici briefs in *Crawford*. Affected statements could include 911 calls, statements to authorities, and statements to people who are not authorities. Each of the potentially affected statements is currently given to fact-finders through hearsay exceptions. The result is well-informed fact-finders. To continue to provide fact-finders with the information they need to make well-informed decisions, the court must analyze each statement on a case-by-case basis and reject the analysis that accusatory statements are *per se* testimonial.