IN THE

Supreme Court of Virginia

RECORD NO. 100202

ANTHONY DALE CRAWFORD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

Samantha E. Freed (VSB #74079)
SNOOK & HAUGHEY, P.C.
408 East Market Street
Suite 107
Post Office Box 2486
Charlottesville, Virginia 22902
(434) 293-8185
(434) 295-0698 (Fax)
sefreed@snookandhaughey.com

Counsel for Appellant

Steven D. Rosenfield (VSB #16539)
ATTORNEY AT LAW
913 East Jefferson Street
Charlottesville,
Virginia 22902
(434) 984-0300
(434) 220-4852
attyrosen@aol.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE PARTIES AGREE THAT FORFEITURE BY WRONGDOING WAS AN INCORRECT BASIS FOR THE TRIAL COURT ADMITTING THE CONTROVERSIAL AFFIDAVIT, AND ALL THAT REMAINS IS THE QUESTION OF WHETHER THE AFFIDAVIT IS TESTIMONIAL AND THEREFORE INADMISSIBLE. 1

A. The "right result/wrong reason" doctrine is not applicable here..... 2

B. Affidavits are testimonial. 3

1. If the "primary purpose" for the statement matters, it should be evaluated from the perspective of the person making the statement..... 5

2. If there is an exception that makes admissible an affidavit filed to "protect the health and safety of the petitioner," that exception must be narrowly drawn to apply only to affidavits necessary to bring action to alleviate an emergency..... 9

C. The error was not harmless 12

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT CONVICTIONS OF ABDUCTION WITH INTENT TO DEFILE AND RAPE 13

CONCLUSION..... 15

CERTIFICATE 17

TABLE OF AUTHORITIES

CASES

Commonwealth v. Gonsalves, 445 Mass. 1, 833 N.E.2d 549 (2005) 10

Commonwealth v. Linton, 456 Mass. 534, 924 N.E.2d 722 (2010)..... 4

Commonwealth v. Simon, 456 Mass. 280, 923 N.E.2d 58 (2010) 10

Crawford v. Commonwealth, 55 Va. App. 457 (2010) 1

Crawford v. Washington,
541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....passim

Davis v. Washington,
547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)..... 4, 5, 11

Greenlaw v. United States, 554 U.S. 237, 128 S. Ct. 2559 (2008)..... 3

Kansas v. Henderson, 284 Kan. 267, 160 P.3d 776 (2007) 11

Melendez-Diaz v. Massachusetts,
557 U.S. ___, 129 S. Ct. 2527 (2009)..... 4, 5

People v. Bryant, 483 Mich. 132, 768 N.W.2d 65 (2009) 10

White v. Illinois,
502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992)..... 4

CONSTITUTION AND STATUTUES

The Constitution of Virginia, Article, V.I., §1 3

Virginia Code §19.2-398(A)(2) 3

Appellant relies on the Statement of the Case and Material Proceedings in the Trial Court and Statement of Facts previously submitted in his opening brief.

ARGUMENT

I. THE PARTIES AGREE THAT FORFEITURE BY WRONGDOING WAS AN INCORRECT BASIS FOR THE TRIAL COURT ADMITTING THE CONTROVERSIAL AFFIDAVIT, AND ALL THAT REMAINS IS THE QUESTION OF WHETHER THE AFFIDAVIT IS TESTIMONIAL AND THEREFORE INADMISSIBLE.

The entire *en banc* Court of Appeals – both the majority and minority opinions – agrees that the admission of the decedent's affidavit was improperly admitted into evidence by the trial court on the basis of the "forfeiture by wrongdoing" doctrine. *Crawford v. Commonwealth,* 55 Va. App. 457 at 474 (majority conclusion) and 482-83 (minority conclusion) (2010). The Attorney General concedes that the trial court erred; see Appellee's Brief at 18. For the purposes of this Confrontation Clause analysis, therefore, it does not matter whether Anthony Crawford killed Sarah Crawford.

Can the Commonwealth now challenge the trial court's determination that the decedent's affidavit was testimonial (a legal conclusion conceded by the Commonwealth at trial), and, if they can, was the affidavit testimonal (and therefore inadmissible)?

A. The "right result/wrong reason" doctrine is not applicable here.

While conceding that the trial court erred in deciding that the "forfeiture by wrongdoing" doctrine governed this case, the Commonwealth wants this Court to apply the "right result/wrong reason" doctrine. Appellee's Brief, p. 18.[1] That doctrine is both unnecessary and inappropriate. Once it is determined that the trial court erred in introducing the document under the "forfeiture by wrongdoing" doctrine, the only remaining issue is whether the affidavit should have been deemed "testimonial." A corollary to this issue is the argument raised by Crawford, but not addressed directly by the Commonwealth – whether the Commonwealth has standing to challenge the trial court's finding that the affidavit was testimonial under *Crawford v. Washington*.

The Commonwealth wants this Court to search for a reason to correct an error in the trial court ruling by inserting different reasoning for admitting the affidavit. Appellee's Brief pp. 18-19. But the issue of standing is in tension with the doctrine that permits this Court (in some cases) to find a different basis for upholding a trial court's decision because the legislature chose to restrict the basis for when the Commonwealth may appeal.

---

[1] "However, for the reasons that follow, the trial court reached the correct decision by admitting the affidavit, albeit for the wrong reason." Crawford urges this Court to adopt the reasoning of the four minority judges in the *en banc* decision.

At trial, the Commonwealth conceded that the affidavit was testimonial, the trial court found it to be testimonial, and the Commonwealth may not appeal that determination to this Court. The Constitution of Virginia, Article VI, §1 and Virginia Code §19.2-398(A)(2) do not give the Commonwealth the right to appeal the exclusion of evidence on the ground that its admission would violate the Confrontation Clause .

To rule otherwise would be to contradict the Virginia Constitution and the General Assembly's restrictions. As a point of guidance, in *Greenlaw v. United States*, 554 U.S. 237, 128 S.Ct. 2559, 2564 (2008), the United States Supreme Court held that "an appellate court may not alter a judgment to benefit a nonappealing party. This Court, from its earliest years, has recognized that it takes a cross-appeal to justify a remedy in favor of an appellee." The "right result/wrong reason" doctrine is not applicable here.

B. Affidavits are testimonial.

In *Crawford,* the Supreme Court held that certain kinds of statements, including affidavits specifically, are in what the Court called the "core" class of testimonial statements. *Crawford,* 541 U.S. at 51-52, 124 S.Ct. at 1364, 158 L.Ed.2d at 193. The Supreme Judicial Court of Massachusetts regards this "core class" of testimonial statements to be testimonial *per se*. See,

e.g., *Commonwealth v. Linton*, 456 Mass. 534, 550, 924 N.E.2d 722, 737 (2010).

Somewhat puzzlingly, the Attorney General asserts that "it is significant that the Court did not go as far as to hold that all affidavits are *per se* testimonial," citing *Melendez-Diaz v. Massachusetts,* 557 U.S. ___, 129 S.Ct. 2527, 2532 (2009). If not a statement that affidavits are *per se* testimonial, the Court came pretty close:

> There is little doubt that the documents at issue in this case fall within the "core class of testimonial statements" thus described. Our description of that category mentions affidavits twice. See also *White v. Illinois,* 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., concurring in part and concurring in judgment) ("[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"). The documents at issue here, while denominated by Massachusetts law "certificates," are quite plainly affidavits: "declaration [s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths." Black's Law Dictionary 62 (8th ed.2004). They are incontrovertibly a " 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Crawford [v. Washington,* 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)] , 124 S.Ct. 1354 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine-the precise testimony the analysts would be expected to provide if called at trial. The "certificates" are functionally identical to live, in-court testimony, doing "precisely what a witness does on direct examination." *Davis v. Washington,* 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (emphasis deleted).

Justice Thomas was particularly unequivocal:

> I join the Court's opinion in this case because the documents at issue in this case "are quite plainly affidavits," *ante,* at 2532. As such, they "fall within the core class of testimonial statements" governed by the Confrontation Clause.

129 S.Ct. at 2543 (Thomas, J., concurring).

1. <u>If the "primary purpose" for the statement matters, it should be evaluated from the perspective of the person making the statement.</u>

The Commonwealth notes, Appellee's Brief, p. 21, that both *Crawford* and *Davis v. Washington,* 547 U.S. 813 (2006), involve some level of interrogation by law enforcement personnel, as though that were the, or even a, critical ground of distinction. But that surely cannot be the test of whether hearsay violates the Confrontation Clause – only by a great stretch of the term can the lab certificates in *Melendez-Diaz* be thought of as being in response to interrogation. *Davis* includes language that, taken out of context, might suggest that, at least in some circumstances, the testimonial character of a statement is determined from the point of view of an official investigator. *Id.* at 822 (referring to "the primary purpose of the interrogation"). But *Davis* recognized that "even when interrogation exists, it is in the final analysis of the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." *Id.* at 822 n. 1.

As this passage indicates, making the definition of "testimonial" depend on the purpose of an interrogator could not lead to coherent doctrine. For one thing, there is not always an interrogator. It makes no sense, therefore, to have a theory of the Confrontation Clause that involves two different analyses – one for when there was an interrogator (preliminary hearings and interrogations), and a completely different analysis when there was no interrogator (affidavits and lab tests).

Furthermore, even when there is an interrogator, it makes no sense for the interrogator's purpose to determine whether the statement is testimonial. It is the speaker – in this case, Sarah Crawford – who is deemed a witness if her statements are testimonial in nature, and therefore it is the speaker with whom the accused arguably has a right to be confronted. If the speaker anticipates that her statement will be used for prosecutorial purposes, the fact that she gives the statement in response to official questioning does not make the statement any less testimonial than it would be if she gave the statement spontaneously; even if at the moment the speaker utters the statement, the interrogator (presumably not knowing the situation as well as the speaker does) does not anticipate or intend the prosecutorial use, that does not deprive the statement of its testimonial character.

On the other hand, if the speaker is not acting as a witness, his statement will not be rendered testimonial by the fact that an official interrogator hopes to use it for prosecutorial purposes. Police seek evidence from many different types of sources – such as inanimate objects, plant material, animals, and fluid traces, in addition to human beings. That the investigator hopes to find or even create evidence for prosecutorial use does not render the source of the evidence a witness for purposes of the Confrontation Clause. It bears emphasis that the Confrontation Clause is not a regulation of police conduct, but rather a rule governing how testimony against an accused must be given. It is the self-conscious testimonial act of the speaker, the purported witness, that renders him subject to the Confrontation Clause.

When looked at from the perspective of the person whose statements are sought to be admitted, the distinction between an official affidavit for use in bringing a criminal charge and an official affidavit for use in initiating the quasi-criminal Petition for Protective Order is rather slim. It makes no sense in the real world to draw that distinction. In fact, the complainant will swear out both a criminal complaint (we interpret the Attorney General's brief as acknowledging that the Criminal Complaint would always be testimonial) and a quasi-criminal affidavit in support of the preliminary

protective order before the same magistrate. The same magistrate will then issue both a domestic assault warrant and a preliminary protective order. Both documents will be served on the defendant at the same time, by the same police officer or deputy sheriff.

When the case comes to court, typically they arise on the same Juvenile & Domestic Relations District Court docket, before the same judge. The same judge may hear both, often at the same time. Practices differ as to whether the Commonwealth's Attorney assists in the pursuit of the preliminary protective order; in some jurisdictions, in some cases, the Commonwealth's Attorney will seek the order under §16.1-279.1. In other jurisdictions, a Victim Witness Coordinator working in the Commonwealth's Attorney's office may assist the complainant through the protective order process. Of course, the predicate for the issuance of a preliminary protective order is that the person seeking the order must allege that he or she has been assaulted by the other. The two proceedings are completely intertwined.

It makes little sense for one document to be admissible in a later criminal prosecution and for another document containing the same allegations to be inadmissible.

The entire purpose of the affidavit offered by the wife was to communicate, under oath, to a judge certain facts in order to influence the judge to favorably decide a matter requested by the wife. In our Opening Brief at 12-13 we cited to Justice Scalia's and Chief Justice Rehnquist's reliance in *Crawford* on the definition of "testimony" in support of the affidavit meeting that definition; this argument was not addressed by the Commonwealth in her Brief. It was likely not addressed because, unlike the wife's comments to her co-workers, Mrs. Crawford made "[a] solemn declaration or affirmation . . . for the purpose of establishing or proving some fact" -- the very definition of testimony. Appellant's Brief p. 15.

What mattered was that when Mrs. Crawford filed her affidavit in support of the protective order, she was making a "solemn declaration or affirmation" and she was doing it for the purpose of establishing or proving a fact. It makes no difference under the Supreme Court's analysis whether Mrs. Crawford's allegation is included in a Criminal Complaint or in a quasi-criminal Petition for Preliminary Protective Order. The term "testimony", as defined by the Supreme Court, applies in both civil and criminal cases.

2. <u>If there is an exception that makes admissible an affidavit filed to "protect the health and safety of the petitioner," that exception must be narrowly drawn to apply only to affidavits necessary to bring action to alleviate an emergency.</u>

The Supreme Judicial Court of Massachusetts got it right in a case in which the prosecution attempted to introduce statements made by the police to an assault victim after the assailant had left the scene:

> We conclude that questioning by law enforcement agents, whether police, prosecutors, or others acting directly on their behalf, other than to secure a volatile scene or to establish the need for or provide medical care, is interrogation in the colloquial sense. This includes "investigatory interrogation," such as preliminary fact gathering and assessment whether a crime has taken place. Under our reading of *Crawford*, statements elicited by such interrogation are per se testimonial and therefore implicate the confrontation clause. No further analysis is needed.

Commonwealth v. Gonsalves, 445 Mass. 1, 9, 833 N.E.2d 549, 555-56 (2005). See also *Commonwealth v. Simon*, 456 Mass. 280, 300, 923 N.E.2d 58, 75 (2010):

> Although much of the 911 call was not testimonial *per se*, five statements contained therein were testimonial per se because, viewed objectively, they would not have helped resolve the ongoing emergency or secure the crime scene.

The Supreme Court of Michigan reached the same conclusion in *People v. Bryant*, 483 Mich. 132, 143, 768 N.W.2d 65, 71 (2009):

> The police found the victim lying on the ground outside a gas station. The police asked him what had happened, who had shot him, and where the shooting had occurred. The victim told the police that defendant shot him about 30 minutes earlier at defendant's house, which was about six blocks away, and that he drove himself to the gas station. These statements related solely to events that had occurred in the past and at a different location. None of these statements referred to events occurring at the time the statements were made, none alleged any ongoing threat, and none asserted the

> possible presence of the alleged perpetrator. The circumstances, in our judgment, clearly indicate that the "primary purpose" of the questioning was to establish the facts of an event that had *already* occurred; the "primary purpose" was not to enable police assistance to meet an ongoing emergency.

The U. S. Supreme Court has granted *certiorari* in this case by order dated June 23, 2010 under the name of *Michigan v. Bryant.*

Another instructive case is *Kansas v. Henderson*, 284 Kan. 267, 284, 160 P.3d 776, 787 (2007). In that case, a three-year-old was found to have gonorrhea. She was treated by medical personnel, and then interviewed by a police officer and a social worker. The state argued that the child's statements to the police officer and social worker were nontestimonial because the Kansas statutory scheme authorized the investigation to protect children from abuse and neglect.

> By contrast, Henderson emphasizes that the interview purpose was not to protect F.J.I.'s welfare. Henderson notes, among other things, that he – the alleged perpetrator – had not been in F.J.I.'s home for at least 2 weeks at the time of the interview, thus distinguishing it from the typical situation where SRS may need to remove a child from a home environment. He contends that the " 'primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution' " of him. See *Davis,* 547 U.S. at ----, 126 S.Ct. at 2274, 165 L.Ed.2d at 237.
> We agree with Henderson that the facts do not support the State's arguments.

It is not enough to say that the purpose of the statutory scheme in the middle of which the statement was made is one of protection and safety.

The affidavit in this case was not sworn out to help police "secure a volatile scene" or to get "medical care," and it was not "to enable police assistance to meet an ongoing emergency." It was clearly testimonial.

C. The error was not harmless.

The Commonwealth argues that the "evidence against Crawford was truly overwhelming" as she argues for application of the harmless error doctrine. Appellee's Brief p. 26. Because four judges of the Court of Appeals found that even with the affidavit admitted, the evidence remaining did not establish harmless error beyond a reasonable doubt, the remaining evidence can hardly be viewed as "overwhelming". No other piece of evidence gave any detail of prior allegations of violence against Anthony Crawford. The affidavit was the Commonwealth's most powerful evidence (which is perhaps why they fought so hard for its admission).

On another piece of evidence, the Commonwealth relegates to a footnote the juror's note found after the trial had concluded which powerfully explains the impact the affidavit had on that juror. Appellee's Brief, p. 26. The trial court's failure to examine the juror about the note does not diminish the note's importance in showing the significant role the affidavit played. Indeed, the affidavit stated the (untested by cross-examination) allegation that Mrs. Crawford had previously been raped by

her husband (three months before her murder) – the very charge he was facing before the jury.

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT CONVICTIONS OF ABDUCTION WITH INTENT TO DEFILE AND RAPE

The Commonwealth's first and second arguments assert that Crawford waived his claim either because he admitted during oral argument that if the affidavit was properly admitted there was sufficient evidence to convict him, or because he did not include this claim in his Assignments of Error.

The record is clear that Crawford raised a sufficiency argument in a motion to strike at the end of the Commonwealth's case and that Crawford raised this claim before the Court of Appeals panel because the claim succeeded. Crawford addressed the hypothetical question asked of his counsel at oral argument in his Brief, pp. 30-31. As argued above, the sworn testimony of Mrs. Crawford, untested by cross-examination, told the jury that her husband had previously raped her in a time frame three months before her murder. This "fact" was sufficient, if properly before the jury, to allow a reasonable inference that he raped her on this occasion.

Finally, the Commonwealth argues that an assignment of error was not submitted to this Court on the sufficiency issue and therefore was

waived. This argument was made knowing that in the questions presented portion of his Brief, Crawford asks this: " 7. Was the evidence insufficient to sustain the convictions of abduction with intent to defile and rape? (Error 5)," Appellant's Brief, p. 7. The Commonwealth never mentions the questions presented, but instead focuses only on the assignment of errors for which Error 5 directly matches. Surely, Crawford has adequately identified for this Court a crucial claim raised at trial, successful before the panel and argued before the en banc court with dissents from a number of judges. Crawford followed the written rules and the spirit of the rules and has not waived this claim.

The Commonwealth is conflicted about who has the burden of proving guilt. At pp. 38–40 in her brief, the Commonwealth correctly explains its burden at trial and the elements it must prove to obtain a conviction. Notwithstanding the Commonwealth's burden at trial, she criticizes Crawford for not putting on evidence in support of his theory of the case. Because Crawford did not testify, but instead relied on the Commonwealth's introduction at trial of his statements to the police, answering whatever questions were posed, the Commonwealth says that Crawford failed to: prove that the sex was consensual, prove why he had tried to take his own life, explain how his wife got into the hotel room, prove

why she was stripped naked, prove why she was posed in the manner she was found, prove why he "fled" to Florida, prove why he left his wife "to die,"[2] and prove why he did not seek medical attention for her. Appellee's Brief, p. 40. She further argues that at trial, no evidence was "presented" that the intercourse Crawford had with his wife was consensual, forgetting that it was the Commonwealth who had to produce evidence of non-consensual intercourse.[3]

The Commonwealth never tried to explain how Sarah was abducted; it was she who picked up Crawford and she who was in the driver's seat at the time of the shooting. No evidence was introduced that she was forced to pick him up or drive him around or that she was alive after the shooting.

CONCLUSION

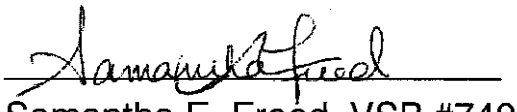
For the foregoing reasons raised above and in his Opening Brief, Crawford asks for the same relief sought in his Opening Brief.

---

[2] The Commonwealth's own pathologist said that her death could have been instantaneous or within an hour of being shot, hardly an endorsement of proof beyond a reasonable doubt that she was alive after being shot and therefore abducted against her will. JA 727-728.

[3] The Commonwealth's own trial evidence was that there was no vaginal injury or other physical injury indicia of non-consensual intercourse or anal intercourse. JA-1042-1043; JA-739. The *en banc* majority also criticized Appellant for stating that the intercourse between Crawford and his wife was consensual ignoring that at trial Crawford was presumed innocent of rape. Crawford, 55 Va. App at fn 8, p. 563.

ANTHONY DALE CRAWFORD
By Counsel



Samantha E. Freed, VSB #74079
Snook & Haughey, P.C.
408 East Market St., Suite 107
P. O. Box 2486
Charlottesville, Virginia 22902
Tel (434) 293-8185
Fax (434) 295-0698

CERTIFICATE

1. I hereby certify that the names and addresses of the counsel for each party are as follows:

For the Appellant, Anthony Dale Crawford:

Samantha E. Freed, VSB #74079
Snook & Haughey, P.C.
408 East Market St., Suite 107
P. O. Box 2486
Charlottesville, Virginia 22902
Tel (434) 293-8185
Fax (434) 295-0698

Steven D. Rosenfield, VSB #16539
Attorney at Law
913 E. Jefferson Street
Charlottesville, VA 22902
Tel (434)984-0300
Fax (434) 220-4852

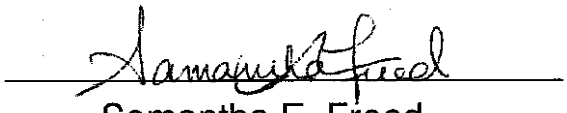
For the Appellee, Commonwealth of Virginia

Leah A. Darron
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Tel (804) 786-2071
Fax (804) 786-1991

2. Counsel for the appellant, Anthony Dale Crawford, has been court-appointed.

CERTIFICATE OF MAILING

I hereby certify that the original and fifteen (15) copies of Reply Brief of Appellant were hand delivered to the Honorable Patricia L. Harrington, Clerk, at the Supreme Court of Virginia, 100 North Ninth Street, Richmond, Virginia 23219 and three copies (and one electronic copy) were mailed to Leah A. Darron, counsel for the appellee, Assistant Attorney General, at 900 East Main Street, Richmond, Virginia, 23219, on the 28th day of July, 2010. An electronic copy was also sent via email to the Supreme Court of Virginia this same date.



Samantha E. Freed