IN THE

Supreme Court of Virginia

RECORD NO. 100202

ANTHONY DALE CRAWFORD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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

Steven D. Rosenfield, Esq.
(VSB #16539)
ATTORNEY AT LAW
913 East Jefferson Street
Charlottesville, VA 22902
Tel: (434) 984-0300
Fax: (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

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ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in holding that an affidavit in support of an *ex parte* petition for a protective order is not "testimonial" within the meaning of Confrontation Clause cases, in violation of Anthony Crawford's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

2. The Court of Appeals erred in holding that the principle of "forfeiture by wrongdoing" applies to permit extra-judicial statements in cases that arise in domestic relations contexts, even without specific proof in this case that the Defendant killed the victim to silence her or to keep her from testifying against him, in violation of Anthony Crawford's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

3. The Court of Appeals erred in holding that the Court of Appeals is not bound by the trial court's ruling and the prosecutor's concession that the affidavit was "testimonial."

4. The Court of Appeals erred in applying the "right result/wrong reason" doctrine to uphold the conviction.

5. The Court of Appeals erred in failing to address Appellant's argument that the evidence was insufficient to sustain the convictions of abduction with intent to defile and rape.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

Sarah Crawford died of a single gunshot wound on November 19, 2004. On November 26, 2004, the Defendant, Mr. Anthony Dale Crawford, was arrested and charged with homicide and other related crimes.

On April 18, 2005, the grand jury indicted Mr. Crawford on charges of (1) capital murder[1], (2) use of a firearm during the commission of a rape, (3) use of a firearm during the commission of an abduction, (4) rape, and (5) grand larceny.

The defense objected to the admission of *ex parte* affidavits executed by Sarah Crawford (there were two – one had been executed in 1997, and one was executed in 2004, weeks before her death). In those affidavits, Sarah Crawford made allegations that Anthony Crawford had threatened her. On April 18, 2006, the Circuit Court for the City of Charlottesville, the Honorable Edward L. Hogshire, presiding, held a hearing on Mr. Crawford's motion *in limine*. The Commonwealth did not dispute that the affidavit was testimonial hearsay. Instead, the Commonwealth argued that under the forfeiture by wrongdoing doctrine,

Mr. Crawford had forfeited his right under the Sixth Amendment Confrontation Clause to challenge the admissibility of the affidavits.

On April 28, 2006, the court denied the motion *in limine* in part, but granted the motion as to the 1997 affidavit, ruling that the affidavit made in 1997 was too remote in time to be relevant to the case at bar. The court permitted admission of the 2004 affidavit, but required the Commonwealth to redact particular statements about Mr. Crawford's alleged mental health and drug use. Judge Hogshire agreed with the Commonwealth that the 2004 affidavit was testimonial, but permitted it for the reason advanced by the Commonwealth.

Trial began on February 5, 2007 and lasted five days. During the trial, Mr. Crawford renewed his objection to the admission of the redacted version of the *ex parte* affidavit. At the end of the Commonwealth's case and again when the parties rested, the defense moved to strike the Commonwealth's evidence, arguing that the evidence was insufficient as to the abduction charge and the rape charge. These were overruled.

On February 9, 2007, Mr. Crawford was found guilty of capital murder, abduction with intent to defile, rape, use of a firearm in the

commission of a murder, use of a firearm in the commission of an abduction and grand larceny. He was found not guilty of using a firearm in the commission of a rape. On February 20, 2007, he was sentenced to life in prison for capital murder and rape, three (3) years in prison for use of a firearm in the commission of a murder, sixty (60) years in prison for abduction, three (3) years in prison for use of a firearm in the commission of an abduction, and one (1) year in prison for grand larceny.

The case was appealed to the Court of Appeals, and a panel of the Court of Appeals ruled that the affidavit was not admissible, and remanded for a new trial. *Crawford v. Commonwealth*, 53 Va.App. 138, 670 S.E.2d 15 (2008). The Commonwealth sought *en banc* review, which was granted. The Court of Appeals then affirmed the trial court. *Crawford v. Commonwealth*, 55 Va.App. 457, 686 S.E.2d 557 (2009)(en banc). Mr. Crawford then noted his appeal to this Court.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in upholding the trial court's admission of the victim's 2004 affidavit in support of her application for a preliminary protective order? (Error 1)

2. Is the affidavit in support of an *ex parte* petition for a protective order "testimonial" within the meaning of the Confrontation Clause cases, and is its admission in violation of Anthony Crawford's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution? (Error 1)

3. Does the principle of "forfeiture by wrongdoing" apply to permit extra-judicial statements in criminal cases arising in domestic relations contexts, even where there is no proof that the Defendant killed the victim to silence her or to keep her from testifying against him? (Error 2)

4. Did the Court of Appeals err in holding that an appellate court is not bound by the trial court's ruling not appealed by the defendant, that an appellate court is not bound by a prosecutor's concession that the affidavit was "testimonial" and that the Court of Appeals erred in allowing the

Commonwealth to appeal the trial court's ruling that the affidavit was testimonial? (Error 3 and Error 4)

5. Was admission of the affidavit harmless error? (Error 1 – 5)

6. Did the Court of Appeals err in failing to address Anthony Crawford's argument that the evidence was insufficient to sustain the convictions of abduction with intent to defile and rape? (Error 5)

7. Was the evidence insufficient to sustain the convictions of abduction with intent to defile and rape? (Error 5)

STATEMENT OF FACTS

Anthony Dale Crawford and Sarah Crawford were married on March 12, 1999. They had met in high school and never had children together.

Sarah Crawford was found dead by the Charlottesville Police on the morning of November 22, 2004 at the Quality Inn hotel in Charlottesville. JA-377. She died from a single gunshot wound. JA-728. Anthony Crawford had paid for the room for the night of November 19-20, 2004. JA-896-906. Police officers entered the motel room, noticing personal effects, luggage, clothing and the shape of a body under the covers. There were women's clothes on the dresser, next to a purse that contained Sarah Crawford's driver's license. JA-451. Police officers also found a suitcase that contained, among other items, a pill bottle with Anthony Crawford's name. JA-407; JA-452.

Sarah Crawford was found lying on her back, naked. JA 398; Commonwealth Exhibit 5 at JA-1226. She had been shot once under her right armpit near her right breast. That shot was the cause of her death. JA-728. The Medical Examiner found no signs of trauma consistent with a rape. JA-739. Mr. Crawford's semen was found inside his wife, and on

her mouth and anus. JA-812. No firearm was ever found that matched the bullet that had lodged in her body.

Before she died, Sarah Crawford was apparently in the process of ending her marriage to Mr. Crawford. On October 29, 2004, she removed her belongings from Mr. Crawford's apartment with the help of her parents, Mr. and Mrs. Powers, and she moved to a new apartment in a rural area. JA-545-554.

On November 1, 2004, Sarah Crawford applied for a preliminary protective order from the Prince William County Juvenile and Domestic Relations District Court. JA-1347-1348. In the affidavit submitted in support of her petition, she made a number of allegations of past incidents of abuse, including numerous assaults, forced sexual relations, and threats of violence. JA-1345-1346. The preliminary protective order was issued that day and promptly served on Mr. Crawford. JA-1348. Notwithstanding the protective order, though, Sarah Crawford continued to have contact with Anthony Crawford. Telephone records reveal that Sarah and Anthony called each other on several occasions between November 1 and November 19, 2004, including two calls from Sarah's cell phone to Anthony's phone on the morning of November 19, 2004 – the day that

Anthony checked into the Quality Inn hotel in Charlottesville. JA-1042-1043. During this time Sarah paid for Anthony to attend a trade school. JA-1043-1045. When a 15-day hearing required by the terms of Va. Code Ann. § 16.1-253.1(B) was held on November 16, 2004, Sarah Crawford asked the Juvenile and Domestic Relations District Court to dissolve the protective order, which was done. JA-1041.

Mr. Crawford was arrested in Florida on November 26, 2004, where he gave a voluntary statement that he and his wife, in an attempt to reconcile, drove together from Manassas, Virginia, where they each lived, to Charlottesville. He told police that he tried to kill himself that weekend, and that his wife was shot when she tried to grab the gun from him. JA-982-983; JA-1344.

ARGUMENT

1. The Court of Appeals erred in Upholding the Trial Court's Admission of the Sarah Crawford's 2004 Affidavit in Support of Her Application for a Preliminary Protective Order, in Violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

A. The Crucial Question Under Confrontation Clause Analysis is Whether the Affidavit for a Preliminary Protective Order is "Testimonial."

The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, *Pointer v. Texas*, 380 U. S. 400, 403 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court adopted a new analysis for determining whether the admission of hearsay statements violates a defendant's rights under the Confrontation Clause. The Court distinguished between "testimonial" and "non-testimonial" out-of-court statements, holding that if a statement is testimonial in nature, the Confrontation Clause requires that the out-of-court statement be rejected

as evidence unless two conditions are met: the witness must be unavailable, and the defendant must have had a prior opportunity for cross-examination. *Id.* at 68.

The Court considered what kinds of evidence might be "testimonial." The Court explicitly included affidavits in its non-exhaustive list of types of testimonial states.

> The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused-in other words, those who "bear testimony." 2 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Ibid. 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.
>
> Various formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois*, 502 U.S. 346, 365, 112

> S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment)...

Crawford, 541 U.S. at 51-52. Chief Justice Rehnquist, concurring in the judgment, recognized that affidavits, by their nature, are what the Framers likely had in mind in drafting the Confrontation Clause: "... I agree that the Framers were mainly concerned about sworn affidavits and depositions..." *Id.* at 71. Both the majority, *id.* at 51, and the concurrence , *id.* at 71, quoted 2 N. Webster, An American Dictionary of the English Language (1828) which defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. Such affirmation in judicial proceedings, may be verbal or written, but must be under oath."

Since the United States Supreme Court decided *Crawford* in 2004, most of the case law on what constitutes a "testimonial" statement has focused on 911 calls, scientific reports or victim statements at the scene of the crime.

In 2006, the United States Supreme Court decided two cases that involved out-of-court statements made in the context of a domestic assault

case. In doing so, it agreed that a 911 call of a domestic assault in progress may be nontestimonal, while a police report taken after the assault was over was to be considered testimonial. *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 2273-4 (2006), dealt with both Hershel Hammon and Adrian Davis. The Court held that:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court held that a 911 call of an assault in progress was "non-testimonial," while a police report taken after the danger had passed was "testimonial." However, 911 calls are not automatically non-testimonial; see *Wilder v. Commonwealth*, 55 Va.App. 579, 687 S.E.2d 542 (2010), quoting *United States v. Cadieux*, 500 F.3d 37, 41 (1st Cir.2007), for the proposition that a 911 call that did not seek police assistance to resolve an "ongoing emergency", but which instead described past events, would be testimonial.

Last year, the United States Supreme Court held that affidavits of forensic tests were "testimonial." *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527 (2009).

> 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. ... 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*, supra, at 51, 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).

The lab certificates were held to be inadmissible because of three essential characteristics:

1. They are functionally the same as affidavits, which are exactly the kind of out-of-court statements that the Confrontation Clause was intended to ban;

2. They are used as declarations to establish facts; and

3. The certificates are in lieu of actual in-court testimony.

See also Justice Keenan's dissent in *Magruder v. Commonwealth*, 275 Va. 283, 310, 657 S.E.2d 113, 127-29 (2008), *vacated and remanded sub nom. Briscoe v. Virginia*, 2010 U.S. LEXIS 767 (Jan. 25, 2010), noting that the U.S. Supreme Court

> ... instructs us to examine the purpose for which a non-testifying witness initially made the statements that were later introduced in evidence at a criminal trial, and to inquire whether the person making the hearsay statements was "testifying" and "acting as a witness." See *Davis*, 547 U.S. at 828, 126 S.Ct. at 2277.

In this case, the Court of Appeals, sitting *en banc*, concluded that Sarah Crawford was trying to get help for herself when she swore out the affidavit in support of her petition for a protective order, so her affidavit was nontestimonial. *Crawford v. Commonwealth*, 55 Va.App. 457, 481, 686 S.E.2d 557, 568-569 (2009)(en banc). In so holding, the Court of Appeals

erred by seeming to focus on the likely subjective intent of the dead declarant, rather than on the function that the affidavit serves in the justice system.

A preliminary protective order is obtained when a Petition is filed:

> The order may be issued in an ex parte proceeding upon good cause shown when the petition is supported by an affidavit or sworn testimony before the judge or intake officer.

Va. Code Ann. §16.1-253.1(A). In other words, the preliminary protective order can be obtained EITHER when the declarant comes to court and testifies to a judge or intake officer, OR when the declarant executes an affidavit under oath. The affidavit was sworn to by a "witness," the affidavit was evaluated by the judge for its veracity, and the witness's information was accepted as true. All of the indicia of a testifying "witness" have been met in accordance with Webster's Dictionary and common practice: the witness was providing "evidence," while under "oath," in anticipation that her information would be believed.

Applying the lessons of *Melendez-Diaz*, Sarah Crawford's affidavit is testimonial because:

1. Affidavits are exactly the kind of out-of-court statements that the Confrontation Clause was intended to ban;

2. This affidavit was offered as declarations to establish facts; and

3. The affidavit was in lieu of actual in-court testimony.

If, on the other hand, we apply the lessons of *Davis*, the affidavit is testimonial because:

1. Like Sylvia Crawford in *Crawford v. Washington*, Sarah Crawford in this case was "describing past events", see *Davis*, 547 U.S. at 827 (testimonial), and not "speaking about events *as they were actually happening," id.*, as Michelle McCottry had been doing in *Davis* (non-testimonial).[1]

2. Like Sylvia Crawford in *Crawford v. Washington*, Sarah Crawford in this case was not facing an ongoing

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[1] Sylvia Crawford's interrogation took place hours after the events she described had occurred (non-testimonial). Michelle McCottry was speaking in the present tense about an attack that was then under way (testimonial). In this case, the events described in the affidavit had happened days, weeks or months before the affidavit was completed.

emergency (testimonial); on the other hand, Michelle McCottry was facing an ongoing emergency (non-testimonial). *Davis*, 547 U.S. at 827.

3. Like Sylvia Crawford in *Crawford v. Washington*, Sarah Crawford's statements that were being set forth in the affidavit were not intended to "resolve the present emergency" but simply to learn what had happened in the past.

In this case, Sarah Crawford was not in present danger. She had no present emergency. Her affidavit refers to events that happened several months and days before the affidavit was created, indicating there was no real ongoing emergency the day when the affidavit was filed.

The Court of Appeals focused on what it assumed Sarah Crawford's intent to have been in preparing the affidavit:

> Because the primary purpose of the affidavit was not to "prove past events potentially relevant to later criminal prosecution" but rather to obtain a civil, preliminary protective order, we hold that the statements contained therein were nontestimonial under Davis.

Crawford, 55 Va.App. at 481-82. More persuasive is the dissent of Judges Beales and Alston to the *en banc* opinion that the Court of Appeals took the "primary purpose" language out of context from *Davis*. See *Crawford*, 55 Va.App. at 509-510. In *Davis*:

> [T]he Supreme Court was comparing two specific examples of hearsay, one in which the declarant clearly was not concerned about future prosecution, but instead was concerned about an immediate emergency. In the contrasted case involving Hammon, the statement was given to police officers, but the record does not indicate that it was prepared with the understanding that the statement would be presented at trial. The Supreme Court stated that if the primary purpose is "to enable police assistance to meet an ongoing emergency," 547 U.S. at 822, 126 S.Ct. at 2273, then the statement is not testimonial. Nothing in the record here indicates that Mrs. Crawford was under assault when she signed the affidavit. Therefore, her affidavit clearly does not fall into the non-testimonial category under this part of the *Davis* test. However, the Supreme Court also indicated that, if no ongoing emergency existed and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," then the statement is testimonial. Mrs. Crawford's affidavit clearly falls into this category.

Under these circumstances, an affidavit in support of a petition for a protective order is testimonial, and the Court of Appeals' holding to the contrary was erroneous.

B. "Forfeiture by Wrongdoing" is Not Applicable Here.

The Commonwealth argued at trial that Mr. Crawford, by killing Sarah Crawford, forfeited his right to the protection of the Confrontation Clause to suppress her statements. The Commonwealth argued that because Mr. Crawford's actions caused Sarah Crawford to be unavailable to testify in person against him, Mr. Crawford should not be allowed to use the Confrontation Clause to prevent her testimony from being used in her place.

On appeal, there was agreement between the *en banc* majority and the dissenters that the forfeiture by wrongdoing doctrine was misapplied by the trial court. "I concur with the en banc majority's statement that, under the doctrine of forfeiture by wrongdoing, evidence which is testimonial may 'not be admitted without a showing that the defendant intended a witness from testifying' (Internal quotations omitted.) I also concur in the majority opinion to the extent it holds that the trial court, '[by] not considering

[appellant's] intent, . . . incorrectly applied the forfeiture by wrongdoing doctrine, as it was defined in Giles.'" *Crawford*, 55 Va.App. at 474.

The Court of Appeals went on to hold that concluding error by the trial court on the forfeiture by wrongdoing doctrine did not, however, end the inquiry, and that admission of the affidavit is supported by the "right result/wrong reason" doctrine.

C. The Court of Appeals incorrectly applied the "right result/wrong reason" doctrine when it concluded that the issue of whether the affidavit contains testimonial hearsay was properly before the Court on appeal.

The trial court held that the affidavit was testimonial. On appeal, the Commonwealth took the position that the Court of Appeals was not bound by either the trial prosecutor's affirmative concession that the affidavit was testimonial or by the Commonwealth's acceptance of the trial court's finding that the affidavit was testimonial. The panel decision of the Court of Appeals was rejected by the *en banc* majority; the *en banc* majority held that the trial court's admission of the affidavit was the right decision but for the wrong reason. The majority stated that the issue of whether the affidavit was testimonial was properly before the Court, despite the fact

that the Commonwealth conceded that the affidavit was testimonial for purposes of *Crawford v. Washington*.

Anthony Crawford's trial attorneys filed a motion *in limine* seeking exclusion of the affidavit based on the principle that the affidavit was testimonial and its admission into evidence would violate the Confrontation Clause of the Sixth Amendment. The Commonwealth, in its written brief, referred to the affidavit as "testimonial" and argued its admissibility based only on the "forefeiture by wrongdoing" doctrine." During oral argument on this motion *in limine*, Mr. Crawford's attorney stated that he did not "see in the Commonwealth's response that there's any disagreement that those statements are, in fact, testimonial." JA-118. The Court issued a letter opinion, and in its opinion wrote "[I]t is clear, and the Commonwealth does not dispute, that these statements do fall within the scope of Crawford." JA-11. The trial court went on to hold that the evidence was admissible, though it applied a legally incorrect interpretation of "forfeiture by wrongdoing" when it found that it was not necessary to establish that Mr. Crawford killed his wife to ensure she could not testify against him. JA-13. The Court of Appeals held that this ruling was incorrect, but that if the trial court had applied what it regarded as the correct analysis, it would have

concluded that the affidavit was not in fact testimonial at all. The Court held that this was a permissible application of the doctrine of "right result/wrong reason."

This Court, in *Whitehead v. Commonwealth,* 278 Va. 105, 115, 677 S.E.2d 265, 270 (2009) noted with approval an explanation of "right result/wrong reason" doctrine:

> An appellate court may affirm the judgment of a trial court when it has reached the right result for the wrong reason. However,
>
> > [t]he rule does not always apply. . . . [T]he proper application of this rule does not include those cases where, because the trial court has rejected the right reason or confined its decision to a specific ground, further factual resolution is needed before the right reason may be assigned to support the trial court's decision.
>
> *Harris v. Commonwealth*, 39 Va. App. 670, 675-676, 576 S.E.2d 228, 231 (2003), *Blackman v. Commonwealth*, 45 Va. App. 633, 642-643, 613 S.E.2d 460, 465 (2005) ("an appellee may argue for the first time on appeal any legal ground in support of a judgment so long as it does not require new factual determinations.")

This doctrine – "right result/wrong reason" – should not have been applied, because the Court of Appeals had to consider additional facts

beyond those considered by the trial court when it ruled that the affidavit was admissible. The trial court ruled that the affidavit was admissible under the forfeiture by wrongdoing doctrine. The trial court was not asked to make any factual determinations regarding the testimonial nature of the affidavit because the Commonwealth's Attorney conceded that the affidavit was in fact testimonial.

Although rejected by the majority, the Court of Appeals panel majority pointed out:

> The Commonwealth had no right to appeal that ruling, and it would have had no right to appeal even if the trial court had excluded the affidavit on the grounds appellant alleged. See Code section 19.2-398. . .
>
> Thus, the Commonwealth also lacked the right to ask this Court to revisit that issue in appellant's appeal because to do so would "serve as a subterfuge for a constitutionally prohibited cross-appeal." See *White v. Commonwealth*, 37 Va. App. 658 (2002)(noting that although we may, under appropriate circumstances , "affirm the decision of the trial court when it has reached the right result for the wrong reason[,] . . . . 'the Commonwealth cannot use [this principle] as a subterfuge for a constitutionally prohibited cross-appeal'"(quoting *Driscoll v. Commonwealth*, 14 Va. App. 449, 452, 417 S.E.2d 312, 313 (1992))); see also *Hart v. Commonwealth*, 221 Va. 283, 289-90, 269 S.E.2d 806, 810-11 (1980)." *Crawford*, 53 Va.App. at 149.

This Court held in *Hart v. Commonwealth,* 221 Va. At 289, "[w]e will not in this appeal permit the Commonwealth to accomplish indirectly what it cannot do directly, and we therefore reject the alternative ground advanced for the admissibility of Hart's confession." This Court said that it would not allow the Commonwealth to, in effect, appeal the unappealable.

The *en banc* majority believes that the Attorney General may take a different position than the one taken by the Commonwealth's Attorney at trial. *Crawford*, 55 Va.App. at 474, ftn 12. In support, the majority cites to *In re: Department of Corrections*, 222 Va. 454, 465, 281 S.E. 2d 857, 863 (1981) quoting this Court when it said:

> It is apparent that the Commonwealth has assumed inconsistent positions. The Commonwealth's Attorney, the only official legal representative of the Commonwealth in the trial court, acquiesced in the procedure that the Attorney General now attacks. Nevertheless, the Commonwealth may not be estopped from repudiating the earlier position erroneously taken by the Commonwealth's Attorney, nor may the Department be estopped from changing its position.

In re: Department of Corrections was a challenge to the jurisdiction of the trial court wherein the Commonwealth's Attorney took the position that the trial court had jurisdiction to act as it procedurally had and on appeal the Attorney General said it did not have the authority. This Court found

that the Attorney General could take a different position because jurisdiction can never be waived by the Commonwealth's Attorney. The *en banc* majority criticized Judge Elder's reliance in *In re: Commonwealth*, 278 Va. 1, 13, 677 S.E. 2d 236, 241 (2009) in which this Court held:

> We will not permit the Commonwealth to ask the circuit court during the remanded hearing on mental retardation to exercise discretion and rule upon other legal issues but, inconsistently, assert in the mandamus proceeding that the circuit court lacked legal authority to do so. The Commonwealth will not be allowed to approbate and reprobate.

The distinction offered by the *en banc* majority was that *In re: Commonwealth* was not a criminal appeal. But, *In re Commonwealth* was, for all intents and purposes, an appeal surrounding procedural aspects of a criminal capital case. This Court should resolve this difference of interpretation by reconciling the two positions. It is without dispute that when a trial court acts without jurisdiction, that court decision is void *ab initio* and can be challenged at any time by any party. *Jenkins v. Dir. of the Va. Ctr. for Behavioral Rehab.*, 271 Va. 4, 13 (2006)(". . . any judgment rendered by a court without subject matter jurisdiction is void *ab initio*.") The *en banc* majority would like to expand *In re: Department of Correction* to permit the Attorney General to take a different position any time when it

did not agree with the Commonwealth's Attorney. Such a doctrine would then justify appeals taken by the Commonwealth contrary to its limited statutory authority on when it may appeal, simply by repudiating a position taken by the Commonwealth's Attorney and asserting a new position on appeal.

This Court is asked to conclude that the Commonwealth was estopped from appealing the trial court's ruling holding that the affidavit in question was testimonial for purposes of *Crawford v. Washington.*

In the alternative, the Court is asked to conclude that the Court of Appeals erred in concluding that the affidavit was non-testimonial.

D. Admission of the affidavit was not harmless error.

This Court should not underestimate the impact of this affidavit. A juror's notes were found after the trial in the jury room.[2] The juror wrote that if it were not for the protective order, "I would not be able to even

[2] The juror's note in its entirety is as follows: Last night I wanted Dale to be guilty. I fought the idea of finding him completely not guilty. 1st - people may think I'm a wimp. or (sic) it seems like a waste of all this effort to just let him off. However, - according to our instructions, Dale Crawford is not guilty , , (sic) until proven otherwise. The Commonwealth has not proven how the gun was fired much less what was on Dale's mind when it went off. This is true even if I assume that was intentional abduction and rape. Last night afraid to find him not guilty. - all this trouble - what would people think It is were not for the restraining order or bullet angle, I would not be able to even consider murder w/ malice.

consider murder w/ malice." JA-21. This was not harmless error on the part of the trial court.

To say that the admission of the decedent's affidavit was powerful evidence is an understatement. In closing argument, the prosecutor made several references to the affidavit.

1. In one reference, the prosecutor stated "You know from her affidavit, out of her own mouth almost, those are Sarah Crawford's words." JA-1127.

2. "On Monday, November 1st of 2004, she obtains a protective order. That will be in evidence; that's what's attached to her affidavit. You've all read it and seen it." JA-1131.

3. "Her affidavit says on October 30th ... Anthony called me and told me I must want to die. He also said he also understands why husbands kill their wives." JA-1133.

Moreover, the jury was left with a sworn affidavit that went undisputed that Mr. Crawford had previously beat and raped his wife. It is difficult to find more prejudicial evidence spoken by the decedent as if she were in court.

The trial Court erred in acknowledging the forfeiture by wrongdoing doctrine and subsequently admitting the affidavit of Sarah Crawford. This Court is asked to reverse the convictions against Mr. Crawford since admission of the affidavit was not harmless error.

2. The Court below erred by not addressing the issue of whether the evidence was sufficient to sustain the convictions of abduction with intent to defile and rape.

At the end of the Commonwealth's case, Crawford moved to strike the evidence on the rape and abduction charges, claiming that there were no facts supporting those charges. The Court of Appeals majority concluded that at oral argument before the *en banc* court, Crawford conceded that, had the affidavit been properly admitted, there was sufficient evidence supporting convictions for rape and abduction. The proper context of that concession, however, provides the reason why such a concession was made. Counsel pointed out to the court at oral argument that the admission of the affidavit was influential to the jury, because post-trial evidence revealed that one of the jurors had written a note on the writing pad used for note taking during trial, explaining that but for the protective order he would <u>not have</u> considered murder with malice. JA-21. It was in that context that appellate counsel said that admission of the

affidavit did support the convictions based on what a juror had concluded. The concession does not make sense otherwise because the appellant's opening brief and reply brief all offer a compelling argument for why admission of the affidavit was not harmless error. In addition, appellant counsel fully relied on and adopted the excellent analysis provided by the panel's decision on this issue.

The *en banc* decision stops its analysis after concluding that appellant conceded at argument that there was sufficient evidence to convict on the rape and abduction charges. However, it was improper to rely on this concession as a reason to forego deciding whether there was sufficient evidence to sustain the convictions of abduction with intent to defile and rape.

3. The evidence was insufficient to sustain the convictions of abduction with intent to defile and rape.

The trial court erred when it failed to grant the motion to strike on the charges of abduction with intent to defile and rape, since there was insufficient evidence to convict on these charges.

The Commonwealth, with or without the affidavit in evidence, had no proof that on this occasion, Anthony Crawford raped his wife, or that he abducted her with the intent to defile her. The Commonwealth needed to introduce evidence sufficient to exclude every reasonable hypothesis of innocence, *Commonwealth v. Hudson*, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003). They did not. The evidence presented at trial was not sufficient, as a matter of law, to prove beyond a reasonable doubt that Mr. Crawford abducted Sarah Crawford and raped Sarah Crawford.

The Commonwealth tried to establish an abduction and a rape circumstantially by showing that Sarah Crawford was afraid of her husband and would not have gone voluntarily with him or engaged in consensual intercourse. Their proof on this point consisted of the affidavit and statements admitted into evidence addressed above.

On the other hand, despite the facts set forth in the affidavit, Sarah Crawford voluntarily withdrew her request for a protective order. JA-1041. She called her husband repeatedly on days leading up to her departure with him. It was undisputed that Sarah and Anthony Crawford had arranged to meet the morning of November 19, that Mrs. Crawford was in a good mood, that they talked twice on the morning in question by telephone,

and that Crawford told police in his confession that he was hoping they would get back together. JA-1042-1043. Also, during their separation, Sarah Crawford supported her husband financially by paying his tuition to the Delta Career Academy in Mt. Sterling, Kentucky less than two weeks prior to her death. JA-1043-1045. Finally, there was no vaginal trauma or other indicia of coerced intercourse. JA-1042-1043; JA-739. The medical examiner testified that there was no damage to her genitalia and no damage to the rectum or anus. There was no bruising to the inner thighs or on the buttocks. JA-736-739.

The Commonwealth presented no evidence, as was their burden, that the meeting, subsequent drive or sexual activity of the parties occurred other than by consent. As the panel opinion had observed:

> Assuming the evidence concerning the box with traces of Mrs. Crawford's blood on it that was found by the side of the road near Manassas between 9:30 and 10:30 a.m. would have been sufficient to establish appellant shot Mrs. Crawford while they were still in the Manassas area and then drove her to Charlottesville, the Commonwealth's evidence also did not compel a finding that appellant abducted Mrs. Crawford before or after the shooting. The evidence indicated appellant was without a car of his own at that time, permitting the inference that Mrs. Crawford, who went willingly to appellant's home that morning, might also willingly have agreed to take him on an errand before she was shot. The evidence also did not

> compel a finding that appellant abducted Mrs. Crawford after she was shot because no evidence in the record established how long she lived after being shot. Instead, the assistant medical examiner testified he could not say how long Mrs. Crawford would have lived after sustaining such an injury and that he "might expect [based on] anecdot[al evidence] that it might be minutes" but that it was possible she lived a "shorter" amount of time and also possible that she "survived an hour."[3] (Emphases added.) Thus, no evidence compelled a finding that appellant's pulling Mrs. Crawford's body into the back seat, driving her to the motel, or moving her inside the motel constituted a deprivation of her liberty necessary to prove abduction.

Crawford v. Commonwealth, 53 Va. App. 138, 159 (Va. Ct. App. 2008).

There was no evidence to suggest that sexual intercourse was accomplished by threat, force or intimidation. Also, there was no evidence to allow the jury to conclude that Mr. Crawford abducted Ms. Crawford with intent to defile her. Finally, even if the evidence did support an abduction, there was no evidence that Mr. Crawford used a firearm in abducting his wife.

CONCLUSION

The Court is asked to make the following rulings:

1. The affidavit in support of an *ex parte* petition for a protective order is "testimonial" within the meaning of the Confrontation Clause cases, and

its admission violates Anthony Crawford's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

2. The principle of "forfeiture by wrongdoing" does not permit admission of the affidavit without specific proof in this case that the Defendant killed the victim to silence her or to keep her from testifying against him, and its admission would violate Anthony Crawford's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

3. The Court of Appeals erred in holding that an appellate court is not bound by the trial prosecutor's concession that the affidavit was "testimonial" and not bound by the trial court's finding that the affidavit was testimonial.

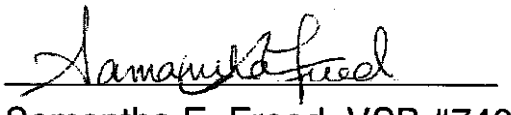
4. The Court of Appeals erred in applying the "right result/wrong reason" doctrine to uphold the conviction.

5. Admission of the affidavit is not harmless error.

6. The Court of Appeals erred in failing to address Anthony Crawford's argument that the evidence was insufficient to sustain the convictions of abduction with intent to defile and rape.

7. The evidence was insufficient to sustain the convictions of abduction with intent to defile and rape and the corresponding use of a firearm in the commission.

Respectfully submitted,
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

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

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

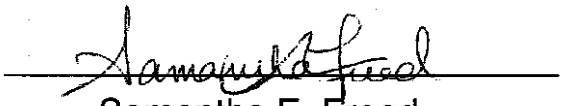
For the Appellee, Commonwealth of Virginia

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 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 one (1) copy was delivered to Leah A. Darron, counsel for the appellee, Assistant Attorney General, at 900 East Main Street, Richmond, Virginia, 23219, on the 28th day of June, 2010.



Samantha E. Freed