IN THE

Supreme Court of Virginia

RECORD NO. 100202

ANTHONY DALE CRAWFORD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF AMICUS CURIAE
THE VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

Anthony Dale Crawford,
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v. Record No. 100202

Commonwealth of Virginia,
Appellee.

BRIEF OF *AMICUS CURIAE* VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Pursuant to Rule 5:30, Rules of the Supreme Court of Virginia, the Virginia Association of Criminal Defense Lawyers (hereinafter, "VACDL") respectfully files this brief *amicus curiae* in support of Appellant's position.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Appellant, Anthony Dale Crawford (hereinafter, "Crawford"), was charged in City of Charlottesville Circuit Court with capital murder, abduction with intent to defile, rape, grand larceny, use of a firearm in the commission of a murder and use of a firearm in the commission of abduction. The trial court denied a motion filed by Crawford to suppress an affidavit made by the victim, his deceased wife Sarah, on the grounds that it violated his rights under the Confrontation Clause.

On appeal to the Court of Appeals, a divided panel of that Court reversed all of Crawford's convictions except for the grand larceny conviction, agreeing that the trial court's admission of the affidavit violated Crawford's rights under the Confrontation Clause. However, upon rehearing *en banc*, the Court of Appeals affirmed Crawford's convictions, holding that, since the affidavit was for the protective order rather than the criminal prosecution, it was non-testimonial and did not implicate Crawford's rights under the Confrontation Clause. It is from that ruling of the Court of Appeals that this appeal was timely taken.

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 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.

QUESTIONS PRESENTED

1. With respect to Assignment of Error #1, whether 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. With respect to Assignment of Error #2, whether 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. With respect to Assignment of Error #3, whether the Court of Appeals erred in holding that the Court of Appeals is not bound by the trial prosecutor's concession that the affidavit was "testimonial."

4. With respect to Assignment of Error #4, whether the Court of Appeals erred in applying the "right result/wrong reason" doctrine to uphold the conviction.

5. With respect to Assignment of Error #5, whether 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 FACTS

Crawford and his deceased wife, Sarah, were married in 1999 and, by all accounts, had a marriage punctuated by allegations of physical abuse by Crawford. As they were separating in October, 2004, Mrs. Crawford went to

the apartment that they had shared and removed some of her personal property. Because of Crawford's hostility, Mrs. Crawford sought, from the Prince William County Juvenile and Domestic Relations District Court, ("the JDR Court") a preliminary protective order. In order to obtain that order, Mrs. Crawford executed an *ex parte* affidavit so that the Court would have evidence on which to rule. The JDR Court, after considering the affidavit, issued the preliminary protective order.

Mrs. Crawford was later found dead in a motel room and Crawford was charged with her murder and other related offenses. Before trial, Crawford moved to suppress the affidavit executed by Mrs. Crawford in support of the protective order, arguing that the document was testimonial hearsay and that its admission violated his confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004). The trial court denied that motion, but a divided panel of the Court of Appeals agreed with Crawford and reversed all of his convictions except that for grand larceny. Upon rehearing *en banc*, the Court of Appeals reinstated Crawford's convictions, holding that the affidavit presented as evidence of why a protective order should issue was not testimony.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITY

Although Crawford made five (5) assignments of error and raised five (5)

questions presented, this *amicus curiae* brief only addresses the first of those, namely whether an affidavit submitted in support of a protective order, which is a quasi-criminal matter, is testimonial and whether it may be introduced into evidence in a criminal proceeding when the accused did not have the opportunity to exercise his right of confrontation against the affiant.

Although the United States Supreme Court declined, in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), to establish a comprehensive definition of what constitutes a "testimonial" document, it clearly stated that affidavits "or similar pretrial statements that declarants would reasonably expect to be used prosecutorially" fall within the core class of testimonial documents. 541 U.S. at 541-542

So, the first issue, whether Mrs. Crawford's affidavit is testimonial, can be answered in the affirmative. Justice Scalia cited Webster's Dictionary's definition of testimony as

> A solemn declaration or affirmation made for the purpose of establishing or proving some fact. 541 U.S. at 541.

In this case, Mrs. Crawford's affidavit was given to a judge as a sworn representation of certain facts that would persuade that Court to issue an order granting the affiant legal relief, in this case, the entry of a protective order against her husband. Thus, it must be deemed testimonial.

Preliminary protective orders, like temporary injunctions, are matters that can be decided by a court with live testimony or testimony in the form of an affidavit. Whether live and *ore tenus* or written and sworn, testimony is testimony. Also of importance to this case is the fact that it addressed an issue in the criminal case, i.e., their relationship.

The next issue is whether Mrs. Crawford would have reasonably expected her affidavit to be used "prosecutorially." The answer to that can also be answered in the affirmative. Ever since the creation of the statutory protective order, it has been necessary to have a remedy for the violation thereof other than the contempt power of the issuing court. That remedy has been a criminal prosecution under Virginia Code §16.1-253.2, a conviction of which precludes the trial court from imposing a completely suspended sentence. The affidavit is part of the record to be used if such a prosecution is brought.

In *Crawford, supra*, Justice Scalia noted that:

> Some early cases went so far as to hold that prior testimony was inadmissible in criminal cases even if the accused had a previous opportunity to cross-examine. 541 U.S. at 50.

One of the cases that he cited was *Finn v. Commonwealth*, 26 Va. (5 Rand.) 701, 708 (1827). *Finn* involved a situation in which a person had given a

statement against Finn's interests in a jailhouse interview and then left the Commonwealth. That statement was sought to be introduced at Finn's criminal trial and this Court ruled that the testimony was inadmissible.

This Court said:

> In a civil action, if a witness who has been examined in a former trial between the same parties, and on the same issue, is since dead, what he swore to on the former trial, may be given in evidence, for the evidence was given on oath; and the party had an opportunity of cross-examining him. (Citation omitted.) But we cannot find that the rule has ever been allowed in a criminal case; indeed, it is said to be expressly otherwise. (Citation omitted.) Nor can we find that the rule in civil cases extends to the admission of the evidence formerly given by a witness who has removed beyond the jurisdiction of the country; much less can it be admitted in a criminal case. 26 Va. (5 Rand.) at 708.

Finn has only been cited by this Court three times and by the Court of Appeals once. The first was in *Vass v. Commonwealth*, 3 Leigh 786 (1831), in which it was discussed in connection with the admissibility of a dying declaration.

The second occasion on which this Court cited *Finn* was *Parks v. Commonwealth*, 109 Va. 807, 63 S.E. 462 (1909). There, the Court characterized the *Finn* exclusionary language as "obiter dictum" because, in Finn's case, the witness' unavailability was due to his absence from the Commonwealth rather than his death. However, as indicated above, the *Finn*

court made the rule equally applicable to situations in which the affiant was dead AND to situations in which the affiant was absent. Thus, the *Finn* conclusion can hardly be dismissed as dicta. Also, notably, *Finn* has never been overruled by this Court.

The third case in which this Court cited *Finn* was *Fitzgerald v. Commonwealth*, 219 Va. 266, 246 S.E.2d. 899 (1978). However, it was cited there for a different point than the admissibility of a prior statement in a criminal proceeding. Similarly, the Court of Appeals' citation to *Finn* in its unpublished opinion in *Pratt v. Commonwealth*, Record No. 1654-05-2, December 28, 2006, was on a different point.

The due process rights of a person who is the respondent of a family abuse protective order require that any *ex parte* order be in effect for an extremely limited period of time – no more than 15 days - so that the respondent has an opportunity to confront and cross-examine the complainant/accuser and respond to the allegations against him or her. This due process right to confront the complainant/accuser also encompasses the situation in which a respondent might be charged with violating the protective order.

In *Crawford v. Washington*, 541 U.S. at 52, Justice Scalia further adds

that depositions are examples of testimonial evidence and depositions are creatures of civil proceedings. It can be concluded that, like affidavits in civil matters, depositions, too, must be seen as testimonial and only admissible if a defendant in a criminal case has had an opportunity to cross-examine the deponent. Therefore, the *en banc* Court of Appeals majority was wrong to decide that sworn testimony of any nature, including testimony taken in civil proceedings, is not testimonial for Sixth Amendment purposes.

CONCLUSION

In sum, the affidavit executed by Mrs. Crawford was testimonial in nature and Crawford was not given an opportunity to cross-examine her thereon. This Court has previously recognized – and should continue to recognize – a "bright line" rule that distinguishes between testimonial evidence for civil purposes and testimonial evidence for criminal purposes. Said another way, all affidavits furnished in a civil or criminal proceeding should be held to be testimonial when offered into evidence in a criminal matter.

In criminal cases, the Constitution guarantees a right of confrontation. When a witness testifies about a criminal defendant in a case where that defendant has no opportunity to cross-examine the witness, use of that testimony against that defendant in his criminal trial violates his right to

confront his accusers. When a witness testifies about a criminal defendant in a case where that defendant has no opportunity to confront the witness, use of that testimony violates the right of the criminal defendant to confront his accuser.

WHEREFORE, the Virginia Association of Criminal Defense Lawyers respectfully submits this brief *amicus curiae.* Counsel for VACDL on this brief *amicus curiae* respectfully requests oral argument in person.

Respectfully submitted,

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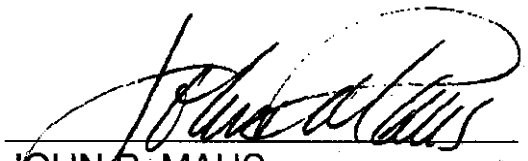

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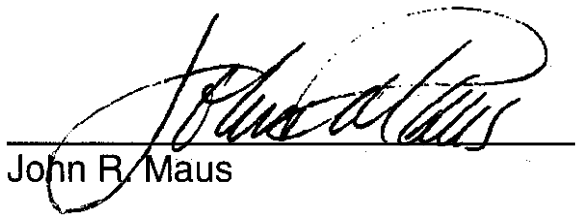
Certificate

I hereby certify, pursuant to Rule 5:17 that a true copy of the foregoing Brief of *Amicus Curiae* was sent by first class mail, postage prepaid to Kenneth T. Cuccinelli, Attorney General of Virginia, 900 East Main Street, Richmond, Virginia 23219 and to Stephen D. Rosenfield, 913 East Jefferson Street, Charlottesville, Virginia 22902 and to Samantha F. Bolton, Snook & Haughey, P.C., Post Office Box 2486, Charlottesville, Virginia 22903, all on the 25TH day of June, 2010.



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