IN THE

# Supreme Court of Virginia

RECORD NO. 100202

ANTHONY DALE CRAWFORD,

*Appellant,*

v.

COMMONWEALTH OF VIRGINIA,

*Appellee.*

## REPLY 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,
Appellant,

v. Record No. 100202

Commonwealth of Virginia,
Appellee.

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

## NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This amicus reply brief by the Virginia Association of Criminal Defense Lawyers adopts the Nature of the Case and Material Proceedings Below from the opening briefs of Appellant and Amicus.

## ASSIGNMENT OF ERROR

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

## STATEMENT OF FACTS

Amicus, VACDL, adopts the Statement of Facts filed in the Appellant's and the Amicus Opening Briefs.

## PRINCIPLES OF LAW, ARGUMENT AND AUTHORITY

### I. SWORN STATEMENTS MADE TO PROVE A FACT ARE TESTIMONIAL.

In its brief, the Commonwealth declares that its ". . . position on appeal [is] that the victim's statement in the affidavit for the protective order were 'non-testimonial' and thus, their admission was not controlled by the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), and did not violate the Confrontation Clause." (*Commonwealth* brief at 18) That is the issue this Court is called upon to decide. This Court should determine that an affidavit used in lieu of live testimony to obtain a temporary protective order is testimonial and is covered by the Confrontation Clause of the Sixth Amendment to the United States Constitution. The testimonial nature of the affidavit is as clear as is the fact that testimony accusing a respondent of domestic violence for a protective order constitutes testimony about past events which "potentially" could be relevant to later criminal prosecution of

that respondent.[1]

In *Crawford v. Washington, supra.*, the Supreme Court ruled that the testimony of a witness, when the defendant has not had an opportunity to cross-examine the witness, is not admissible against the defendant in a criminal trial. Mr. Justice Scalia, in his opinion, specifically reviewed civil practice in the English common-law where *ex parte* examination of witnesses by judicial officers had been permitted. He clearly articulated that the Sixth Amendment's Confrontation Clause was directed against the principal evil of that civil law mode of criminal procedure whereby *ex parte* examination was used as evidence against the accused in a criminal case. *Id.* at 50. Two criteria had to be met for testimonial statements of witnesses absent from trial to be admitted, and they were 1) the declarant

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[1]Since the Commonwealth's "position on appeal" is that the affidavit was "not testimonial", the issue of "forfeiture by wrong-doing" is not before this Court. The *en banc* Court of Appeals determined that the trial court erred in its analysis for admitting the affidavit on that basis. If that had been the basis of that court's decision, then it said it would have to remand the case to the trial court for further consideration on that issue; however, the decision below was that the record before the *en banc* Court of Appeals provided a rationale sufficient for it to affirm the decision of the trial court based on their determination that the affidavit was not testimonial and, thus, was not within the scope of *Crawford v. Washington, supra. Crawford v. Commonwealth*, 55 Va. App. 457, 477, 686 S.E.2d 557, ___ (2009).

was unavailable and 2) the defendant had a prior opportunity to cross-examine the witness. *Id.* at 59.

The testimony at issue in this case was presented in a civil matter; it concerned allegations of domestic violence against the accused; it was potentially relevant to criminal charges against him; and he had no opportunity to cross-examine the witness. The affidavit was testimony regarding a protective order pursuant to Va. Code § 16.1-253.1. That provision of the Code allows courts to determine whether or not to grant such relief based on evidence which may be either by *ore tenus* testimony or testimony by affidavit, both of which constitute testimony seeking to prove a fact to obtain a court ruling. Affidavits are a core class of testimonial statements governed by the Confrontation Clause. *See, Melendez-Diaz v. Massachusetts*, 557 U.S. ___ (2009).

Two years after the *Crawford* decision, the Supreme Court decided *Davis v. Washington*, 547 U.S. 813 (2006). In that case, the police were responding to a then existing, ongoing emergency. Their questions and the responses were to address that "emergency." Since their questions and the responses were to address a potential, imminent, existing danger, the Court found an exception based, principally, on the concept of the then

existing "emergency." An emergency is, by definition, a sudden, urgent, unexpected occurrence requiring immediate action. (*Random House Dictionary*, 2010) The testimony in this case was not a response to questions seeking to address an existing emergency; rather, it was carefully considered testimony about past events regarding allegations of domestic abuse which could have potential use in a future criminal prosecution. The *Davis* decision does not remove the testimony at issue here from the Confrontation Clause.

When, as here, there is no ongoing emergency, witness statements seeking a court ruling are testimonial. Affidavits are testimonial. In *Davis*, Mr. Justice Scalia referenced, as he had in *Crawford*, the N. Webster, *An American Dictionary of the English Language* (1828), for the definition of testimony, which is a solemn declaration or affirmation made for the purpose of proving some fact. *Davis, supra.,* at 824. An affidavit presented to a judge, in lieu of live sworn testimony, to prove a fact necessary to obtain a favorable ruling fits this definition. *See accord, Melendez-Diaz, supra*. Whether or not the person to whom the declaration is made was a law enforcement officer is not relevant, except in the context of, as indicated above, a police officer dealing with an immediate, on-going

emergency, which is not at issue here.[2]

## II. A SWORN STATEMENT WHOSE PRIMARY PURPOSE IS TO WIN A CIVIL RULING IS GOVERNED BY THE CONFRONTATION CLAUSE IN A CRIMINAL CASE.

The Commonwealth's efforts to convert the Supreme Court's decision in *Crawford* regarding the Confrontation Clause to a "primary purpose" test is unavailing because the Supreme Court in *Crawford*, as in *Davis*, spoke in terms of testimonial statements and, as an example of testimony, referenced affidavits in civil cases. In *Crawford*, the Supreme Court specifically defined the core class of testimonial statements covered by the Confrontation Clause to include *ex parte,* in-court testimony, or its functional equivalent, such as affidavits.

The Supreme Court in that case also expressly held that *ex parte* testimony at a preliminary hearing comes under the Confrontation Clause protections. *Crawford v. Washington, supra.,* at 51, 52. The test is not the "primary purpose", such as testimony for a favorable ruling in another case; rather, it is whether or not it is testimony in a circumstance where the defendant had a chance at cross-examination of the witnesses. In this

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[2]The language of Va. Code § 16.1-263.1 does not speak in terms of an existing, on-going emergency. A protective order is permitted if there has been family abuse "within a reasonable period."

case, there was *ex parte* testimony via an affidavit at a preliminary hearing seeking a preliminary injunction. This affidavit is from a civil proceeding without mutuality of parties and, as the Commonwealth argues at footnote 1 on page 23 of its brief, the lack of mutuality in that civil case means that the testimony (affidavit) is not admissible in a criminal case.

It is also reasonable to believe that an affidavit of this sort, regardless of its purpose when used for the protective order, could be relevant to a possible future prosecution, which is why the Supreme Court used the words "potentially" when talking about relevance to a "later" criminal prosecution. *See, also, Davis v. Washington*, *supra*. at 821.

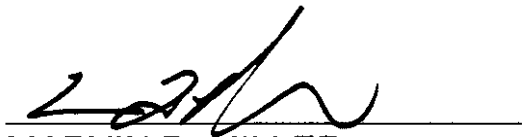
The Supreme Court in *Crawford*, *Davis*, and *Melendez-Diaz* has been clear. The Confrontation Clause applies to sworn testimony where the accused did not have an opportunity to cross examine the witness. The testimony in this case, the affidavit, is by a witness whose testimony was not subject to cross-examination by the defendant.

## CONCLUSION

The affidavit at issue in this appeal is excludable from the criminal trial because it is testimonial and thereby violates the Confrontation Clause of the Sixth Amendment.

Respectfully submitted,

VIRGINIA ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS



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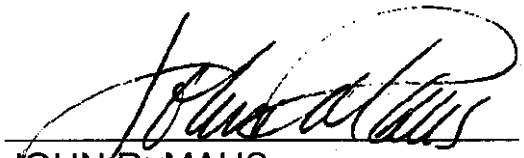

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**CERTIFICATE**

I hereby certify, pursuant to Rule 5:26 that three copies of the foregoing Reply Brief of Amicus Curiae (and an electronic copy) were sent by first class mail, postage prepaid, to Leah A. Darron, Senior Assistant Attorney General of Virginia, 900 East Main Street, Richmond, Virginia 23219, and to Steven D. Rosenfield, 913 East Jefferson Street, Charlottesville, Virginia 22901, and to Samantha F. Bolton, Snook & Haughey, P.C., Post Office Box 2486, Charlottesville, Virginia 22903, all on the 28th day of July, 2010.

Fifteen copies were hand delivered to the Clerk's Office of the Supreme Court of Virginia, and an electronic copy sent via email, this same day.

Marvin D. Miller