REPORT OF THE
VIRGINIA STATE CRIME COMMISSION

SJR 451 Final Report: Study of Crawford and Booker Cases

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

SENATE DOCUMENT NO. 14

COMMONWEALTH OF VIRGINIA
RICHMOND
2006

COMMONWEALTH of VIRGINIA

Virginia State Crime Commission

Senator Kenneth W. Stolle, *Chairman*
Delegate David B. Albo, *Vice Chairman*

Executive Director
Kimberly J. Hamilton

Director of Legal Affairs
G. Stewart Petoe

General Assembly Building, Suite 915
910 Capitol Street
Richmond, Virginia 23219

804-225-4534
Fax: 804-786-7872

December 31, 2005

TO: The Honorable Mark Warner, Governor of Virginia

And

Members of the Virginia General Assembly

The 2005 General Assembly, through Senate Joint Resolution 451, requested the Virginia State Crime Commission to study the implications of Crawford v. Washington and several cases related to the enhancements of sentences based on the facts not found by a jury.

Enclosed for your review and consideration is the report which has been prepared in response to this request. The Commission received assistance from all affected agencies and gratefully acknowledges their input into this report.

Respectfully submitted,

Kenneth W. Stolle
Chairman

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Sylvia A. Reid, Office Manager
Stephen D. Benjamin, Special Counsel

TABLE OF CONTENTS

ATTACHMENT

I. Authority

The *Code of Virginia*, § 30-156, authorizes the Virginia State Crime Commission (Crime Commission) to study, report, and make recommendations "on all areas of public safety and protection." Additionally, the Crime Commission is to study "compensation of persons in law enforcement and related fields" and to study "trial and punishment of criminal offenders." Section 30-158(3) empowers the Crime Commission to "conduct studies and gather information and data in order to accomplish its purposes as set forth in § 30-156. . . and formulate its recommendations to the Governor and the General Assembly."

Pursuant to Senate Joint Resolution 451 (2005),[1] Crime Commission staff conducted a study on the implications of recent United States Supreme Court cases on Virginia statutes.

II. Executive Summary

During the 2005 Session of the Virginia General Assembly, Senator William C. Mims introduced Senate Joint Resolution 451 (SJR 451), which directed the Crime Commission to study the implications of Crawford v. Washington,[2] United States v. Booker,[3] and other related United States Supreme Court cases on established criminal procedures in the Commonwealth. Crawford v. Washington raises issues on the constitutionality of crime lab certificates and uncontested affidavits used at trial. United States v. Booker calls into question the constitutionality of sentence enhancements based on facts that have not been found by a jury. Specifically, the SJR 451 directs that the Commission "shall determine the impact of these United States Supreme Court cases on Virginia's statutes by surveying Virginia statutes and Rules of Court, and identifying those that may be in need of amendment or repeal."

Findings and Recommendations

In response to staff's analysis of the Crawford case and its implications on Virginia law, the Crime Commission determined that Virginia's statutes and Rules of Court are in no need of amendment or repeal. Any action at this time would be premature, as the Supreme Court of Virginia and federal courts around the country have not yet had the opportunity to fully interpret the Crawford case.

Also, based on staff's analysis of the Booker case and its implications on Virginia law, the Crime Commission determined that Virginia's sentencing guidelines do not violate the mandates established by Apprendi v. New Jersey,[4] Blakely v. Washington,[5]

[1] SJR 451 (Va. 2005). *See* attachment A.
[2] Crawford v. Washington, 541 U.S. 36 (2004).
[3] United States v. Booker, 125 S.Ct. 738 (2005).
[4] Apprendi v. New Jersey, 530 U.S. 466 (2000).
[5] Blakely v. Washington, 124 S.Ct. 2531 (2004).

and Booker. As such, no change to Virginia's sentencing procedures is necessary at this time.

III. Methodology

Staff reviewed the Crawford v. Washington decision, as well as the recent cases throughout the country that have dealt with the new doctrine it has created. Special attention was paid to the recent decision issued by the Virginia Court of Appeals, Lugenbyhl v. Commonwealth. Staff also reviewed the recent United States Supreme Court cases dealing with judicial sentencing. The *Code of Virginia* and Virginia's Sentencing Guidelines were then examined to confirm that Virginia's sentencing procedures comport with constitutional requirements.

IV. Background

Crawford v. Washington

In 2004, the United States Supreme Court decided the case of Crawford v. Washington.[6] This case overturned decades of jurisprudence on various exceptions to a defendant's Sixth Amendment right to confrontation. Michael Crawford was charged with stabbing a man who had allegedly attempted to rape his wife, Sylvia. Both the defendant and his wife were present at the time of the stabbing. Shortly after the incident, the police interviewed the defendant's wife. In a statement that was tape-recorded, Sylvia Crawford stated that she did not see anything in the victim's hands during the fight. At trial, Michael Crawford testified that he acted in self-defense, and thought he had seen the victim reach for a weapon. Sylvia Crawford was not available to testify at trial, due to Washington's evidentiary rule of marital privilege, where a person may not testify against his or her spouse without the other spouse's consent. However, the prosecution did introduce Sylvia Crawford's recorded statement into evidence.[7] The marital privilege does not extend to a spouse's out-of-court statements that are otherwise admissible under a hearsay exception.[8]

Michael Crawford argued that admitting the recorded statement into evidence violated his federal constitutional right, under the Sixth Amendment, to be "confronted with the witnesses against him."[9] The trial court overruled this objection on the grounds that it met the "test of trustworthiness" as established in Ohio v. Roberts.[10] In Roberts, the Court stated that the Sixth Amendment allows admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of

[6] Crawford v. Washington, 541 U.S. 36 (2004).
[7] Crawford 541 U.S. at 40.
[8] Id.
[9] Id.
[10] Id.

reliability'",[11] based on whether the evidence is either firmly rooted in a hearsay exception, or bears "particularized guarantees of trustworthiness."[12] Using the holding from Roberts, the trial court admitted the tape-recorded statement into evidence, and Michael Crawford was convicted of assault.

The Washington Court of Appeals reversed, after determining that the recorded statement did not bear particularized guarantees of trustworthiness and was therefore not reliable under the Roberts test.[13] The Washington Supreme Court then reinstated the conviction, holding that the statement met the Roberts test of reliability because it bore guarantees of trustworthiness.[14]

The case was granted certiorari to the United States Supreme Court, which held that allowing the recorded statement into evidence violated the defendant's right, under the Sixth Amendment, to confront and cross-examine all witnesses against him. Specifically, the Court found that "the State's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is ... confrontation."[15]

Significance of the Crawford Decision

In discussing their holding in Crawford, the United States Supreme Court emphasized that out-of-court statements may not be used against a defendant if those statements are testimonial in nature, the witness is not present in court, and the defendant has not been given an opportunity to cross-examine the witness.[16] The Court did not give a precise definition of what constitutes a "testimonial statement," but stated that it includes, at a minimum, prior testimony at a preliminary hearing, a former trial, or before a grand jury; and, police interrogations.[17] Thus, the Crawford decision upholds a criminal defendant's right to confront witnesses providing testimony, used at trial, against him, and to that extent overrules Roberts.

The Crawford opinion declined to overrule that part of Roberts, which applies to non-testimonial evidence. Specifically, the Court stated that "where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law."[18] Yet, the Crawford opinion stresses that the Sixth Amendment prohibits the use of *ex parte* statements and affidavits to convict a defendant, especially if those statements were made in contemplation of a criminal trial.[19]

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[11] Id. (citing Ohio v. Roberts, 448 U.S. 56, at 66 (1980)).
[12] Id. (citing Ohio v. Roberts, 448 U.S. 56, at 66 (1980)).
[13] Crawford 541 U.S. at 41.
[14] Crawford, 541 U.S. at 42.
[15] Crawford, 541 U.S. at 69.
[16] Crawford, 541 U.S. at 68.
[17] Id.
[18] Id.
[19] Crawford, 541 U.S. at 67.

In light of this, it is unclear whether crime lab certificates used at trial would be considered testimonial in nature, and therefore, inadmissible under Crawford. Laboratory certificates of analysis are affidavits, made by a chemist at the State Lab, who is usually not present at trial. These certificates are made in preparation for a criminal trial, and are normally made at the request of either law enforcement or a Commonwealth's Attorney. Current Virginia law allows for the introduction of crime lab certificates and affidavits in criminal trials as proof of certain facts.[20]

A related type of certificate is the breath certificate issued in DUI cases. In August 2005, a divided panel of the Virginia Court of Appeals had the opportunity to deal with the issue of breath certificates. In the case of Luginbyhl v. Virginia,[21] the defendant, Luginbyhl, was convicted of driving while intoxicated. The trial court admitted the breath test certificate, and the administering officer did not testify at trial. Luginbyhl appealed his conviction on the grounds that the trial court erred in admitting into evidence the certificate of blood alcohol analysis based on the result obtained from a breath test, in violation of his rights under the Confrontation Clause of the Sixth Amendment.[22] The Court of Appeals held that because the breath test result was generated by a machine, it was not hearsay, and the Confrontation Clause did not apply.[23] The Court further held that the officer's statements contained in the breath test certificate relating to the machine's good working order and the administering officer's qualifications were neutral and non-testimonial, "and [did] not require the Commonwealth to prove, pursuant to Crawford, that the [administering officer] was unavailable and that [the defendant] had a prior opportunity to examine him."[24] The Court panel reaffirmed the conviction.

The Virginia courts have just begun dealing with this issue of the constitutionality of crime lab certificates and the use of affidavits in criminal trials as proof of certain facts.[25] There have been no specific rulings on this point in the Virginia Supreme Court or in the federal courts. As such, Crime Commission staff is actively reviewing the latest developments in this area. The hope is that there will be a federal appellate opinion on this subject prior to the 2007 Session of the Virginia General Assembly.

United States v. Booker

Beginning in 2000, the United States Supreme Court began issuing a series of opinions limiting the ability of judges to sentence defendants on the basis of facts that were not proven beyond a reasonable doubt to a jury. This recent line of cases began

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[20] Va. Code ANN. § 18.2- 268.9 (2005).
[21] Luginbyhl v. Commonwealth, 46 Va. App. 460 (2005).
[22] Luginbyhl, 46 Va. App. at 462.
[23] Luginbyhl, 46 Va. App. at 465.
[24] Id.
[25] Michels v. Commonwealth, 2006 WL 88243 (Va. Ct. App. January 17, 2006) (certified documents from Delaware Secretary of State indicating non-existence of trust company were non-testimonial). See also Commonwealth v. Williams, 2005 WL 3007781 (Va. Cir. Ct. November 10, 2005) (certificate of analysis that drugs were cocaine not testimonial).

with Apprendi v. New Jersey.[26] In Apprendi, the criminal defendant was charged with a firearms offense that carried a prison term of five to ten years. The defendant pled guilty to this crime. Prior to sentencing, the prosecution filed a motion for sentence enhancement, based on a separate statute that allowed for an "extended term" of imprisonment if it was established that the defendant's actions constituted a "hate crime."[27] After a hearing, the judge agreed that the defendant had committed the crime with a purpose to intimidate a person because of race and sentenced the defendant to 12 years, a term greater than that provided for in the original charge. The United States Supreme Court held that this violated the Sixth Amendment - any fact, other than a prior conviction, that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt.[28]

This reasoning in Apprendi was applied two years later to Arizona's capital sentencing process. In Ring v. Arizona,[29] the Supreme Court held that in capital cases, it was not permissible to have a jury find the defendant guilty, and then leave the sentencing determination to a judge, who would have to find "aggravating factors" before he sentenced the defendant to death. The Supreme Court held that the aggravating factors had to be found by a jury; it was not sufficient to have a judge make these findings of fact after the trial.[30]

Perhaps the most relevant case in this recent series of decisions was Blakely v. Washington.[31] In this case, the defendant pled guilty to a second degree kidnapping charge. While the statutory maximum for this crime was ten years, Washington's sentencing guidelines prohibited a judge from imposing any sentence greater than 53 months (four years, five months), unless he found, at sentencing, aggravating factors that justified an exceptional sentence. In Blakely, the judge did find an aggravating factor, that the defendant had acted with "deliberate cruelty," and sentenced him to 90 months (seven years, six months). The United States Supreme Court held that this sentencing scheme violated the defendant's right, under the Sixth Amendment, to have this "fact" determined by a jury.[32]

Blakely stands for the proposition that in terms of an Apprendi analysis, the maximum punishment for a crime is not necessarily the statutory maximum. It is the maximum sentence a judge can impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. If Washington's sentencing guidelines had not been mandatory, with the judge required to sentence the defendant to only four years unless he found aggravating factors, then they probably would have survived this constitutional analysis.

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[26] Apprendi v. New Jersey, 530 U.S. 466 (2000).
[27] Apprendi, 530 U.S. at 468.
[28] Apprendi, 530 U.S. at 490.
[29] Ring v. Arizona, 536 U.S. 584 (2002).
[30] Ring, 536 U.S. at 589.
[31] Blakely v. Washington, 124 S.Ct. 2531 (2004).
[32] Blakely, 124 S.Ct. at 2543.

The most recent case regarding this issue is United States v. Booker.[33] In this case, the United States Supreme Court struck down the federal sentencing guidelines because they were mandatory for judges to follow, and they required judges to make findings of fact that were never proven to a jury beyond a reasonable doubt. The Court held that if the guidelines were merely advisory, then their use would not implicate the Sixth Amendment. However, federal judges must impose sentences within the various guideline ranges, and therefore the guidelines violate Apprendi whenever they include facts that have not been considered by a jury.

In light of these cases, Virginia does not need to make any changes to its sentencing procedure. Virginia does not have a sentencing scheme whereby judges can amplify a defendant's sentence based on factors not considered by a jury. Therefore, Virginia's sentencing guidelines do not violate the mandates established by Apprendi, Blakely, and Booker. Although Virginia does have sentencing guidelines for almost all felonies, none of Virginia's sentencing guidelines calls for a maximum that is greater than the statutory maximum of the crime. Furthermore, Virginia's sentencing guidelines are completely discretionary, and judges are free to disregard them. If, however, Virginia were to make the sentencing guidelines, or some portion of them, mandatory, they would likely violate the Sixth Amendment.

V. Conclusion

In response to staff's analysis of the Crawford case and its implications on Virginia law, the Crime Commission determined that Virginia's statutes and Rules of Court are in no need of amendment or repeal. Any action at this time would be premature, as the Supreme Court of Virginia and federal courts around the country have not yet had the opportunity to fully interpret the Crawford case.

Also, in response to staff's analysis of the Booker case and its implications on Virginia law, the Crime Commission determined that Virginia's sentencing guidelines do not violate the mandates established by Apprendi v. New Jersey,[34] Blakely v. Washington,[35] and United States v. Booker. As such, no change to Virginia's sentencing scheme is necessary at this time.

[33] United States v. Booker, 125 S.Ct. 738 (2005).
[34] Apprendi v. New Jersey, 530 U.S. 466 (2000).
[35] Blakely v. Washington, 124 S.Ct. 2531 (2004).

ATTACHMENT A

Senate Joint Resolution 451

ENROLLED

SENATE JOINT RESOLUTION NO. 451

Directing the Virginia State Crime Commission to study the implications of Crawford v. Washington, United States v. Booker, and other related recent United States Supreme Court cases. Report.

Agreed to by the Senate, February 8, 2005
Agreed to by the House of Delegates, February 24, 2005

WHEREAS, several recent United States Supreme Court cases have raised questions about established criminal procedures of the Commonwealth; and

WHEREAS, on March 8, 2004, the United States Supreme Court rendered an opinion in *Crawford v. Washington* that overturned decades of jurisprudence concerning exceptions to a defendant's Sixth Amendment right to confrontation; and

WHEREAS, current Virginia law allows for the introduction of crime lab certificates and affidavits in criminal trials as proof of certain facts; and

WHEREAS, under *Crawford*, criminal defendants have a right to confront witnesses providing testimony, used at trial, against them; and

WHEREAS, the *Crawford* decision now casts doubt on the constitutionality of crime lab certificates and uncontested affidavits used at trial because these statements may be testimonial in nature; and

WHEREAS, starting with *Apprendi v. New Jersey* decided on June 26, 2002, and continuing with *Blakely v. Washington* on June 24, 2004, and *United States v. Booker* and *United States v. Fanfan* on January 12, 2005, the United States Supreme Court has issued opinions that call into question the enhancement of sentences on the basis of facts that have not been found by a jury; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Virginia State Crime Commission be directed to study the implications of *Crawford v. Washington*, *United States v. Booker*, and other related recent United States Supreme Court cases. The Commission shall determine the impact of the above-mentioned United States Supreme Court cases on Virginia's statutes and shall survey Virginia statutes and Rules of Court and identify those that may be in need of amendment or repeal.

All agencies of the Commonwealth shall provide assistance to the Virginia State Crime Commission for this study, upon request.

The Virginia State Crime Commission shall complete its meetings by November 30, 2005, and the chairman shall submit to the Division of Legislative Automated Systems an executive summary of its findings and recommendations no later than the first day of the 2006 Regular Session of the General Assembly. The executive summary shall state whether the Virginia State Crime Commission intends to submit to the General Assembly and the Governor a report of its findings and recommendations for publication as a House or Senate document. The executive summary and report shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website.