A POLICEMAN’S LOT (CONT.)
[by James Kilpatrick]

A policeman’s lot, as Sir William Gilbert remarked long ago, is not a happy one. The Supreme Court made the policeman’s lot even unhappier two years ago with its unanimous decision in Crawford v. Washington. Maybe some relief is now in sight.

The Crawford case involved a reinterpretation of the Sixth Amendment to the Constitution. To refresh your memory, it reads in relevant part: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”

As a matter of constitutional law, what is “a confrontation”? It depends. In 1999 Michael Crawford was charged with stabbing Kenneth Lee. The facts are murky, as they so often are, but apparently Crawford thought Lee had raped his wife, Sylvia. Skip the facts. On the night of the fracas, Sylvia told the cops, on tape, some incriminating things she quickly regretted. After her husband was indicted, she refused to testify against him. For want of her “testimonial” evidence, the disappointed prosecutor offered the tape. Over the defendant’s objection, it was admitted.

A jury convicted Crawford of assault, and the state Supreme Court affirmed. In March 2004, the U.S. Supreme Court reversed. In a nominally unanimous opinion by Justice Antonin Scalia, the high court held that by offering the tape alone, the state had deprived the defense of an opportunity to cross-examine, i.e. to confront.

All nine justices agreed that the Crawford case must be sent back, but Chief Justice William Rehnquist and Justice Sandra Day O’Connor dissented on the law even as they affirmed on the facts. Rehnquist said, prophetically, that Scalia’s opinion for the court “casts a mantle of uncertainty over future trials.” Thousands of federal prosecutors and “tens of thousands of state prosecutors,” he said, need answers to the problems created by the majority.

Those answers may be forthcoming before the high court’s current term ends in late June. Two parallel cases, one from Washington state, the other from Indiana, already have been granted review. The former asks whether statements made to a 911 operator during an emergency are admissible. The latter, more conventionally, has to do with statements made to investigating officers in response to questions that routinely are asked as detectives go to work.

Such questions are part of a problem that makes a policeman’s lot, in this regard, an especially unhappy one. In a typical case of serious domestic violence, the cops respond. Certain questions have to be asked on the scene. She weeps. He huffs. The cops arrest the husband, charge him with assault. She repents. They make up, sort of. Before trial, she claims marital privilege and refuses to testify against him. The case falls apart. Six months later he belts her again.

Two relevant petitions from Massachusetts were filed in the Supreme Court on Nov. 23. They probably will be put on hold until the cases from Washington and Indiana have been decided.

Case No. 05-674 from Massachusetts involves Hermey Gonsalves, who was charged with assault and battery after a violent altercation with his girlfriend. Police arrived on the scene while she was still “crying and hysterical, ranting, hyperventilating, and pacing around the room.” One officer reasonably asked, “What happened?” She said Gonsalves had throttled her and hit her head on the floor. He is described as a big guy, 6 feet 2 inches, weighing 275 pounds. She made herself “un-available” for trial. His counsel moved for a continuance until the Washington and Indiana cases are decided.

The second Massachusetts case, No. 05-672, Commonwealth v. Jorge Rodriguez Sr., presents a similar question. Evidently Rodriguez lost his temper with his 14-year-old son when he spied the boy outside on a frigid night in February 1992 without a jacket. He “struck or slapped his son a couple of times,” and then made him “take off his shoes and socks and stand outside for 10 minutes.” Officer Moynihan arrived. He naturally asked, “What happened?” Eventually the boy refused to testify against his father. Without such a confrontation in court, the prosecution had only a cop’s hearsay. Rodriguez drew a suspended sentence of one year. His appeal is pending.

As Scalia’s opinion in the Crawford case has been interpreted, Moynihan could testify at trial only that he asked the boy, “Are you hurt?” Answers to any other questions would be out of bounds. Rodriguez has a right to “confront” his son as a witness against him — and the son is mum. The mill wheels of the law really do grind exceedingly small.

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