IN THE SUPREME COURT OF FLORIDA

ANTHONY K. RUSSELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	CASE NO. SC06-335
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

MERITS BRIEF OF THE PETITIONER

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The instant case originated with two trial court cases, *i.e.*, 01-3151-CF, carrying a concealed firearm and 03-172-CF, sexual battery upon a child under 16 years of age (R-1-2).[1]

In case number 01-3151-CF the defendant was initially sentenced to 2 years of probation (R-17). A violation of probation (VOP) affidavit was filed alleging that the defendant had violated probation by committing a lewd or lascivious act (R-25). An order was rendered dismissing the affidavit (R-28).

In case number 03-172-CF the defendant received a sentence of 365 days jail time and 5 years of sex offender probation (R-36). An affidavit of violation of sex offender probation was filed for a curfew violation (R-42). The defendant's probation was reinstated by the court (R-69).

Affidavits of violation were filed in both cases on September 30, 2004 (R-64; 84). Amended affidavits were filed on October 18, 2004. In case number 01-3151-CF the allegations brought were that the defendant failed to report, he did not complete public service hours, he was in arrears in court costs, he was behind on fines payments, and he had committed an aggravated battery upon a pregnant

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[1] References to the record on appeal are indicated "(R-page)." The parties

woman on October 14, 2004 (R-90). Similarly, in case number 03-172-CF the defendant was alleged to have failed to report, was in arrears in costs of supervision and restitution, and had committed an aggravated battery upon a pregnant woman on October 14, 2004 (R-85).

Raymond Torrellas of the Marion County Sheriff's Office testified that he responded to a BP station to speak with the alleged victim, Nicole Delasandro, on October 4, 2004 (R-129).[2] The defendant was not present (R-138). The deputy did not see a battery committed. He merely observed that the alleged victim had a red mark on the left side of her neck towards the rear, where she said the defendant had struck her (R-130; 131). The alleged victim also told the officer that the defendant was her boyfriend (R-130). She also informed the deputy that she was pregnant (R-137). She further said that he wanted to take her car to his sex offender class, but she did not want to let him. She stated also that he wanted money. She also said that when she had attempted to leave the vehicle he grabbed her hair and pulled her back (R-132). When she was able to get away she said that she then went inside the gas station and had someone call the sheriff's office. The alleged victim wrote out the following statement:

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are referred to by their trial court designations.

[2] The testimony of the defendant's probation officer is omitted because the court found that only the allegation of the substantive offense had been proven (R-

> Anthony Russell (my boyfriend) & me[,] Nicole Dalessandro[,] were going to vacuum my car before I take [sic] him to his sex offenders class at the BP. We were fighting about me not dropping him off. he [sic] wanted to go by himself & I said no because I had things to do so we kept fighting and as I told him no as I turned around and he hit me in the back of the neck and I went to grab my key out of the car & he pulled me back & pulled my hair. So I got away & ran to the BP & he pulled off w/ my car.

(R-96).

When the deputy came into contact with the defendant, the defendant did not want to discuss the incident (R-136). The defendant, however, initiated a conversation en route to the jail (R-137). He said that he knew that the alleged victim was pregnant, although he said that he was not sure that it was his baby. He also told the deputy that he does not hit the alleged victim, he just roughs her up. This latter statement was general in nature and not related to the incident under investigation.

During the VOP hearing the defense argued against the admittance of the written statement of the alleged victim:

> Q [PROSECUTOR]: I am going to show you what is marked as State's Exhibit Number [sic] A and ask you if you recognize that?
>
> A [DEPUTY]: Yes. This is a written statement I obtained from the victim.

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160).

Q Okay. Is that a true and accurate depiction of the statement that she wrote out for you and as you signed?

A Yes, ma'am.

[PROSECUTOR] Your Honor, at this time the State would ask that that be entered as State's Exhibit Number 1.

[DEFENSE COUNSEL]: Judge, I am going to object for the record. It's hearsay within hearsay. It's not only a written statement that was made allegedly by the alleged victim in this case, but it's also containing hearsay statements within that statement, so.

THE COURT: Okay. Well, what's the – since I've not seen it, what is [sic] the written statements within the statements that are hearsay?

PROSECUTOR]: The statements are statements of the defendant, which would not be hearsay, would be the State's response to that.

Uhmm, it is hearsay, however, and the State's response would be that hearsay is allowed in a VOP as long as it's not the sole basis of the violation.

THE COURT: So you're of the belief that if she writes down a statement which the defendant told to her that that is still admissible?

[PROSECUTOR]: Well, our – our statement to that would be that would be his statement. I mean, it's for the Court's ruling, I mean –

[DEFENSE COUNSEL]: It's – Judge, the statements in this document, not only is this document hearsay, but there's [sic] statements in this – in this document that said she's talking about what she told him.

And again, it [sic] double hearsay. We don't have the victim here to cross examine her. This violates his Sixth Amendment right to confront the accuser.

(R-133-34).

At the conclusion of the hearing the judge exonerated the defendant of all allegations except the new law battery violation (R-160). The defendant was sentenced to 15 years imprisonment in case number 03-172-CF (R-162; 165). He received an additional five years consecutive to the sentence in 03-172-CF in case number 01-3151-CF. *Id.* In the final order on the VOP the judge wrote, *inter alia*:

> At Trial, the State called, as witnesses, the Defendant's probation officer and the arresting officer. The Defendant testified at Trial. No other live witnesses were presented. Also admitted into evidence, as State's Exhibit "1" was a statement taken by the arresting Officer from the alleged victim. While that statement contained alleged statements made by the Defendant, as the Court orally announced at Trial, the Court placed no weight on any alleged statements of the Defendant referred to in this specific report.
>
> The Defendant was charged with a number of violations of his probation including a condition 5 violation of committing the new crime of aggravated battery upon a pregnant person, namely, his girlfriend. Hearsay is admissible in violation of probation trials provided it is not the sole basis to convict a Defendant. The evidentiary burden of proof on the State of Florida in violation of probation trials is lower than the "reasonable doubt" standard in other criminal cases.
>
> Based upon the evidence presented at Trial, the Court finds that the STATE OF FLORIDA has met its burden of proof in establishing, by the greater weight of the evidence, that the Defendant committed a willful and substantial violation of his probation by violating condition number 5 because he committed a criminal offense (battery) upon his girlfriend. The Court finds the Defendant not guilty on any other alleged violations of his probation, however, as stated above, the condition 5 violation was both established and is willful and substantial. . . .

(R-164-65).

The defendant, who was later acquitted of the substantive charge, filed a motion to mitigate his sentence (R-169). The motion was denied (R-183).

An appeal was taken to the Fifth District Court of Appeal. The defense argued on appeal that a violation could not be founded solely upon hearsay and that the red mark only had significance when the hearsay statement of the alleged victim was considered. Secondly, the defense contended that the defendant was revoked for conduct not charged in the information. Lastly, the defense asserted that admission of the written statement of the alleged victim violated the defendant's right to confrontation.

The Fifth District Court of Appeal rendered a written decision. *Russell v. State*, 920 So. 2d 683 (Fla. 5th DCA 2006) (the decision was previously submitted to this Court in the appendix to the jurisdictional brief of the petitioner). The district court rejected the first argument of the defense by holding "hearsay statements of the battery victim, coupled with the officer's observation of injury, were sufficient to prove a probation violation." *Id*., 684, *citing Arndt v. State*, 815 So. 2d 674 (Fla. 5th DCA 2002); *Morris v. State*, 727 So. 2d 975 (Fla. 5th DCA 1999). Significantly, the court also noted: "We acknowledge what appears to be contrary authority on this point in *Santiago v. State*, 889 So. 2d 200 (Fla. 4th DCA 2004), *Colwell v. State*, 838 So. 2d 670 (Fla. 2d DCA 2003) and *Blair v. State*, 805

So. 2d 873 (Fla. 2d DCA 2001).[3] *Id.,* 684, n. 2.

The defense filed a motion for certification of conflict based on the court's acknowledgment of contrary authority, but the district court denied the motion.

The petitioner filed a jurisdictional brief with this Court. Jurisdiction was accepted by an order dated May 5, 2006.

This brief follows.

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[3]The petitioner does not assert conflict between the instant case and *Blair v. State*, 805 So. 2d 873 (Fla. 2d DCA 2001), because *Blair* differs from the instant case as there was no visible injury on the victim in the earlier case. *Id*., at 875-76.

SUMMARY OF ARGUMENT

Point One: The question of law that requires resolution is whether a VOP based upon an allegation of battery can be proven through only the use of hearsay statements and testimony regarding the observation of an injury on the alleged victim. The trial court found a VOP for battery based only upon (1) the hearsay statements of the alleged victim that were introduced during the responding deputy's testimony, coupled with (2) evidence of an injury in the form of a red mark on the victim's neck (the victim did not testify). The Fifth District Court of Appeal affirmed in *Russell v. State*, 920 So. 2d 683 (Fla. 5th DCA 2006). Two other district courts of appeal, on the other hand, have held that the observation of an injury taken together with inculpatory hearsay statements are insufficient for the purpose of proving a VOP.

The ruling by the Fifth District that such evidence is adequate should be disapproved because the contrary holdings of the Second and Fourth District Courts of Appeal are sounder. The evidence of an injury is of no significance without the hearsay evidence. This Court should hold that a VOP may not be established through the introduction only of hearsay statements by the alleged victim and evidence of an injury otherwise unexplained.

Point Two: The written statement of the alleged victim was inadmissible. Its admission violated the defendant's right to confrontation. The sixth amendment right to confrontation should apply to probation revocation hearings because such proceedings are part of the criminal prosecutions and, further, independently have all of the characteristics of criminal prosecutions. Courts, including this Court and the United States Supreme Court and even some of those courts that have rejected the applicability of the right to confrontation holding of *Crawford v. Washington,* 541 U.S. 36, 42, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004), have ruled that a right to confrontation for probationers exists under the due process clause of the fourteenth amendment.

ARGUMENT

Point One

THE TRIAL COURT ERRED IN SUSTAINING THE VIOLATION OF PROBATION BASED ONLY UPON THE HEARSAY STATEMENTS OF THE VICTIM AND OBSERVATION OF AN INJURY TO THE VICTIM.

The trial court found a VOP for battery based only upon (1) the hearsay statement of the alleged victim that was introduced during the responding deputy's testimony, coupled with (2) observation of an injury in the form of a red mark on her neck (the victim did not testify). There is express and direct conflict between the Second and Fourth District Courts of Appeal and the Fifth District Court of Appeal on the same question of law. The Second and the Fourth District Courts of Appeal have on a number of occasions held that inculpatory hearsay statements that are corroborated only by indicia of an injury are insufficient to prove a VOP. The question of law that requires resolution in this case is whether a VOP based upon an allegation of battery can be proven through the use of hearsay statements and testimony regarding the observation of injuries on the alleged victim. The standard of review for the pure questions of law before [this Court] is de novo." *D'Angelo v. Fitzmaurice,* 863 So.2d 311, 314 (Fla. 2003) (citation omitted).

In this case the alleged victim, who did not testify at the VOP hearing, gave a statement to the police. She had a red mark on her neck, an injury which she attributed to the defendant. In pertinent part, the Fifth District Court of Appeal held in the instant case: "[R]esolution of this issue is controlled by our decision in *Arndt v. State*, 815 So. 2d 674 (Fla. 5th DCA 2002), wherein we concluded that the hearsay statements of the battery victim, coupled with the officer's observation of injury, were sufficient to prove a probation violation." *Russell v. State,* 920 So. 2d 683, 684 (Fla. 5th DCA 2006).[4] This holding is in express and direct conflict with the cases that follow.

The facts in *Santiago v. State*, 889 So. 2d 200 (Fla. 4th DCA 2004), are very similar to those in the instant case. The evidence of battery was in the form of hearsay statements and a red mark on the alleged victim's neck. The Fourth District Court of Appeal held:

> In the case sub judice, the trial court relied upon the victim's mother's hearsay statements and the circumstantial evidence of red marks on the victim's face. Analogous to *Colwell v. State*,

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[4]The rationale of the district court appears to have been aptly stated in an earlier case: "The statements . . . were hearsay, but the substance of the statements was corroborated by the deputies' testimony at the hearing, which was direct evidence - not hearsay." *Morris v. State*, 727 So. 2d 975 (Fla. 5th DCA (1999). *See also Young v. State*, 742 So. 2d 410 (Fla. 5th DCA 1999); *Arndt v. State*, 815 So. 2d 674 (Fla. 5th DCA 2002).

> and *Blair*, although the victim's injuries suggested to the deputy that a battery may have occurred, the deputy's observations could not connect Santiago to the alleged battery. Moreover, that the red marks on her cheek may have resulted from Santiago's slap suffers from the same hearsay deficiency as the remainder of the State's case. It is quite possible that there is another explanation for the red marks wholly independent of Santiago. . . . Therefore, we find that the trial court abused its discretion in revoking Santiago's probation on th[is] violation[].

Santiago, at 203, *citing Colwell v. State*, 838 So. 2d 670 (Fla. 2d DCA 2003), and *Blair v. State*, 805 So. 2d 873 (Fla. 2d DCA 2001).

The Second District Court of Appeal has ruled consistently with the Fourth District Court of Appeal in *Santiago*. The facts in the case of *Colwell v. State*, 838 So. 2d 670 (Fla. 2d DCA 2003), are almost identical to those in the instant case. The deputy responded to a domestic battery call at a convenience store. The alleged victim stated that Colwell had battered her and there was a red mark on her neck. The revocation was reversed. The appellate court held: "[T]he trial court found that there was additional evidence to prove the domestic battery - the red mark on Mrs. Colwell's neck that was consistent with her statements to the deputy and her hysterical demeanor. As a matter of law, this additional evidence was insufficient to sustain the revocation." *Id*., at 671.

In an earlier case, *Colina v. State*, 629 So. 2d 274 (Fla. 2d DCA 1993), the district court rejected a revocation based upon evidence consisting of hearsay in the form of a letter from the alleged victim and testimony as to injuries. The facts were

stated in the following manner by the court:

> There were no eyewitnesses, except the victim, to the battery. The alleged victim did not testify at the probation revocation hearing. While other witnesses testified to the fact that the victim showed evidence of injury, no one could testify as to the origin of the injuries. A letter from the alleged victim admitted into evidence at the hearing was hearsay as was testimony of a police officer and appellant's probation officer.

Id., 275.

The district court held: "Because the evidence relied upon to prove appellant committed a battery while on probation was hearsay, the trial court's finding that appellant violated his probation is improper. We reverse the revocation of probation . . ." *Id*., at 275.

In another earlier case the Second District Court of Appeal reversed a revocation of probation on similar grounds. The case, *Robinson v. State*, 445 So. 2d 1135 (Fla. 2d DCA 1984), involved a probationer who had been placed on supervision for physically abusing her child. *Id.* A deputy responded to the probationer's apartment based upon a report of child abuse. He photographed observed wounds on the child. The probationer and her child told the deputy that the child had fallen down a flight of stairs. Five days later the child told a detective that the probationer had strapped her with a belt. The child also told the detective that the probationer had told her to say that she had fallen down the stairs. The

district court ruled:

> It is well-established that while hearsay evidence is admissible in a probation revocation proceeding, a defendant's probation cannot be revoked solely on the basis of such evidence. As the Fourth District stated in *Combs,*"The rule requiring more than hearsay to establish a violation of probation requires other evidence of the defendant's misconduct, not just other evidence."
>
> In the instant case, only the hearsay testimony of Terry Ann Bacon connected appellant with the alleged probation violation. Neither Deputy Marino's testimony nor the photographic evidence of Sharika's injuries established appellant's guilt of any misconduct. Accordingly, we reverse the order of revocation and subsequent adjudication and sentence and remand with instructions to reinstate appellant's probation.

Id., *citing Combs v. State*, 351 So. 2dd 1103 (Fla. 4th DCA 1977).

As in the above cases, the red mark observed on the victim in this case no more justified the finding by the trial court of a violation then did the hearsay of the victim. Without the hearsay the injury observed is entirely without significance. As the *Combs* court wrote, it is "just other evidence." *Id*. Again, as the *Santiago* court observed: "[T]hat the red marks on her [neck] may have resulted from [the defendant]'s slap suffers from the same hearsay deficiency as the remainder of the State's case. It is quite possible that there is another explanation for the red marks wholly independent of [the defendant]. . . ." *Id*., 203. The same holds true in the instant case. It is possible that the observed injury was sustained by the alleged victim in a manner unrelated to the defendant. Again, the injury is without

significance without reference to the hearsay statements.

This Court should hold that a violation of probation may not be established through the introduction only of hearsay statements by the alleged victim and evidence of an injury otherwise unexplained.

Point Two

ADMISSION OF HEARSAY FROM THE ALLEGED VICTIM DENIED THE DEFENDANT HIS RIGHT TO CONFRONTATION.

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004).[5] If this case involved an initial prosecution rather than a VOP revocation hearing, there is little doubt that *Crawford* would apply. The alleged victim in the instant case made out a written statement for the responding deputy. As detailed above, the trial court had to rely upon the hearsay statements of the victim to find a violation because the officer was the only witness to testify regarding the alleged incident and he did not witness that which had taken place. The victim was not a witness at the hearing. There were no other witnesses

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[5]"Once this Court accepts jurisdiction over a cause in order to resolve a legal issue in conflict, [the Court] ha[s] jurisdiction over all issues." *Murray v. Regier*, 872 So.2d 217, 223 (Fla. 2002).

"Because [the] trial court's ruling [involves] a mixed question of law and fact, [this Court] defer[s] to the trial court on the factual issues but consider[s] the constitutional issues de novo." *Seibert v. State*, 923 So.2d 460, 468 (Fla. 2006).

The claim that the *Crawford* holding should apply to VOP proceedings is currently before this Court in *Peters v. State* (case no. SC06-341).

to the alleged incident. The First District Court of Appeal addressed a similar situation, albeit in the trial context, and held:

> Appellant alleges the trial court erred in admitting the victim's statement to a police officer as to how the victim was injured. The statement should not have been admitted, despite its nature as an excited utterance, because it does not meet the requirements necessary to protect Appellant's right to confront witnesses against him. The victim's statement was testimonial in nature because it was made in response to the officer's direct questioning; the State has not demonstrated that the victim was unavailable to testify; and the prior cross-examination of the victim at deposition was done only for purposes of discovery and not to perpetuate the victim's testimony. Because the statement was testimonial but Appellant had no sufficient opportunity to cross-examine the victim on that statement, the statement is inadmissible under *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Manuel v. State, __So.2d__, 30 Fla. L. Weekly D1248, 2005 WL 1130183 (Fla. 1st DCA 2005).

Again, the instant victim did not testify. There had been no opportunity for the defendant to cross-examine her. As the *Manuel* court observed, even if the defendant had an opportunity to take discovery depositions, that is not a sufficient opportunity for cross-examination.[6]

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[6]The question whether the taking of a discovery deposition is sufficient to satisfy a defendant's right to confrontation under *Crawford* is currently before this Court in *State v. Contreras*, case no. SC05-1767.

A VOP proceeding in Florida is a criminal prosecution. The defense acknowledges the holding of the United States Supreme Court that "[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty." *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 1759-60, 36 L.Ed.2d 656 (1973). As explained in the case that follows, the comparatively benign revocation proceedings considered by the Court in *Gagnon* have little resemblance to the adversarial VOP proceedings held in this state. The analysis of the nature of a probation revocation proceeding by the Supreme Court of Wyoming is illustrative of the fact that for all intents and purposes a violation proceeding, in this state as well as in Wyoming, is a criminal prosecution:

> An administrative probation revocation system, similar to the one discussed in *Gagnon*, is contemplated by Wyoming law. *See* Wyo. Stat. Ann. §§ 7-13- 408 (Lexis 1999). However, there is no indication that this administrative procedure has ever been utilized. Instead, we have made it clear that revocation of probation is a judicial responsibility and jurisdiction of an individual granted probation remains vested in the judicial branch of government during any probationary period of non-incarceration. *Smith v. State,* 598 P.2d 1389 (Wyo.1979).
>
> Except as Wyo. Stat. §§ 7-13-408 supports the foundational supervisory responsibility of probation agents for probation revocation cases, the statute has been nullified and superseded by Wyoming case law and W.R.Cr.P. 39 [FN3] for all aspects of probation revocation. *See Weisser v. State,* 600 P.2d 1320 [(Wyo.1979)]; *Smith* [*v. State*], 598 P.2d 1389 [(Wyo.1979)]; and *Knobel* [*v. State*], 576 P.2d 941 [(Wyo.1978)]. The exclusive process for probation revocation is judicially handled by a filing

through the office of the prosecuting attorney by either an order to show cause and summons or a petition to revoke enforced by an application and the issuance of a bench warrant for arrest.

FN3. W.R.Cr.P. 39(a), provides in pertinent part:

> Proceedings for revocation of probation shall be initiated by a petition for revocation filed by the attorney for the state, setting forth the conditions of probation which are alleged to have been violated by the probationer and the facts establishing the violation.

Wlodarczyk v. State, 836 P.2d 279, 293 (Wyo.1992). We have also made it clear that the constitutional due process rights found in *Gagnon* and *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), must be afforded in judicial revocation proceedings. *Swackhammer v. State*, 808 P.2d 219, 222 n. 1 (Wyo.1991); *Mason v. State*, 631 P.2d 1051, 1055-56 (Wyo.1981).

Given Wyoming's judicial revocation procedure, we must determine if W.R.Cr.P. 44(a)(2) remains consistent with the reasoning found in *Gagnon* as it pertains to appointment of counsel. *Gagnon* considered the right to counsel in terms of an administrative process where a probation officer brought a petition to revoke probation before the Board of Probation and Parole. The probation officer, although acting in a prosecutorial capacity, was nevertheless motivated by the desire to rehabilitate the probationer. *Gagnon*, 411 U.S. at 789, 93 S.Ct. at 1763. The hearing was informal, and no rules of evidence were employed. *Id.* The Board and the probation officer were not necessarily trained in the law, but were familiar with the sociological aspects of probation and parole. Current probation revocation procedures in Wyoming stand in stark contrast to the informal administrative system considered by the United States Supreme Court in *Gagnon.* Pursuant to W.R.Cr.P. 39, all petitions for probation revocation must be brought in district court by a prosecuting attorney who, unlike the probation officer, does not serve two masters.

> The prosecutor speaks neither for the probationer nor his interests in the manner the *Gagnon* Court envisioned probation officers would in an administrative system. Moreover, the Wyoming Rules of Evidence apply to the adjudicative phase of the revocation hearing. W.R.Cr.P. 39(a)(5)(B). Thus, a probationer "enjoys a number of procedural rights which may be lost if not timely raised." *Gagnon,* 411 U.S. at 789, 93 S.Ct. at 1763. In short, a probation revocation proceeding "under our system is an adversary proceeding with its own unique characteristics." *Gagnon,* 411 U.S. at 789, 93 S.Ct. at 1763.

Pearl v. State, 996 P.2d 688, 691 -692 (Wyo. 2000).

At the other end of the spectrum are the VOP proceedings discussed in *Gagnon*. One would be hard pressed to recognize Florida probation officers among those discussed in *Gagnon*:

> Our first point of reference is the character of probation or parole. As noted in Morrissey regarding parole, the ''purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able. .. .'' 408 U.S., at 477, 92 S.Ct. at 2598. The duty and attitude of the probation or parole officer reflect this purpose:
>
> > FN6. In Morrissey v. Brewer, we left open the question ''whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent.'' 408 U.S., at 489, 92 S.Ct. at 2604. Since respondent did not attempt to retain counsel but asked only for appointed counsel, we have no occasion to decide in this case whether a probationer or parolee has a right to be represented at a revocation hearing by retained counsel in situations other than those where the State would be obliged to furnish counsel for an indigent.
>
> While the parole or probation officer recognizes his double duty to

the welfare of his clients and to the safety of the general community, by and large concern for the client dominates his professional attitude. The parole agent ordinarily defines his role as representing his client's best interests as long as these do not constitute a threat to public safety.' [FN7]

> FN7. F. Remington, D. Newman, E. Kimball, M. Melli & H. Goldstein, Criminal Justice Administration, Materials and Cases 910-11 (1969).

Because the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation.

In Morrissey, we recognized that the revocation decision has two analytically distinct components:

> ''The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?''408 U.S., at 479-480, 92 S.Ct., at 2599.[FN8]
>
> FN8. The factors entering into these decisions relate in major part to a professional evaluation, by trained probation or parole officers, as to the overall social readjustment of the offender in the community, and include consideration of such variables as the offender's relationship toward his family, his attitude toward the fulfillment of financial obligations, the extent of his cooperation with the probation or parole officer

> assigned to his case, his personal associations, and-of course-whether there have been specific and significant violations of the conditions of the probation or parole. The importance of these considerations, some factual and others entirely judgmental, is illustrated by a Wisconsin empirical study which disclosed that, in the sample studied, probation or parole was revoked in only 34.5% of the cases in which the probationer or parolee violated the terms of his release. S. Hunt, The Revocation Decision: A Study of Probation and Parole Agents' Discretion 10 (unpublished thesis on file at the library of the University of Wisconsin) (1964), cited in Brief for Petitioner, Addendum 106.

The parole officer's attitude toward these decisions reflects the rehabilitative rather than punitive focus of the probation/parole system:

‘‘Revocation . . . is, if anything, commonly treated as a failure of supervision. While presumably it would be inappropriate for a field agent never to revoke, the whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail.'[FN9]

> FN9. Remington, Newman, Kimball, Melli & Goldstein, supra, n. 7, at 910.

But an exclusive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modification in attitude which is likely to take place once the officer has decided to recommend revocation. Even though the officer is not by this recommendation converted into a prosecutor committed to convict, his role as counsellor [sic] to the probationer or parolee is then surely compromised.

Gagnon, supra, 411 U.S. at 783-785, 93 S.Ct. at 1760- 1761.

The nature of probation revocation hearings in Florida is what clearly earmarks the proceedings as criminal prosecutions. The reality of VOP proceedings in Florida is unlike the idyllic picture painted by the *Gagnon* Court. Although the Wyoming procedure is slightly different than Florida's (*e.g.*, a prosecutor there files the charge rather than a probation officer filing an affidavit of VOP), a Florida VOP proceeding, like those in Wyoming, has most of the characteristics of a criminal proceeding. In both the trial and probation revocation settings a formal charge is brought by an agent of the state. Not only is a prosecutor a state operative, but "[c]learly, a probation officer is an agent of the 'state[]' . . ." *Thomas v. State*, 593 So.2d 219, 220 (Fla. 1992). Probationers also have a constitutional right to notice. *Sampson v. State*, 903 So.2d 1055 (Fla. 2d DCA 2005). Additionally, as is the case with a trial defendant, "[f]air play and justice require that a defendant in a probation revocation hearing be entitled to reasonable discovery pursuant to rule 3.220." *Cuciak v. State*, 410 So.2d 916, 918 (Fla. 1982). There is also a right to a hearing. *Black v. Romano*, 471 U.S. 606, 611-612, 105 S.Ct. 2254, 2258 (1985) ("the final revocation of probation must be preceded by a hearing . . ."). A judge, rather than a lay person, presides. The state is represented by a prosecutor, who carries the burden of proof in either type of proceeding. Admittedly, however, the preponderance burden is less than the trial standard of beyond a reasonable doubt.

"The trial court may revoke probation or community control only if the State proves by the greater weight of the evidence that the defendant willfully and substantially violated a specific condition of the probation or community control." *Stewart v. State*, __So. 2d__, 31 Fla. L. Weekly D796, 2006 WL 616643, 1 (Fla. 1st DCA 2006). The probationer, like a defendant in trial proceedings, has a right to counsel. *State v. Hicks*, 478 So.2d 22, 24 (Fla.1985). Witnesses may be called and cross-examined. *Cuciak v. State*, 410 So.2d 916, 919 (Fla. 1982); Black, supra, U.S. at 612, S.Ct. at 2258 ("The probationer is also entitled to cross-examine adverse witnesses . . ."). Further, "[a] probation violation hearing is subject to the same Florida Evidence Code as any other hearing with the exception that hearsay is admissible." *Gonzalez v. State*, 814 So.2d 1210, 1211 (Fla. 4th DCA 2002). *Fleitas v. State*, 835 So.2d 376, 377 (Fla. 3d DCA 2003), *citing Gonzalez v. State*, 814 So.2d 1210, 1211 (Fla. 4th DCA 2002). Court reporters are also present at both types of proceedings to ensure that accurate records are made. There is a right to appeal from both kinds of proceedings. Fla. R. Crim. P. 9.140(b)(A)-(F). Procedural bars apply just like in any criminal proceeding. *See, e.g., Jones v. State*, 876 So.2d 642 (Fla. 1st DCA 2004). Perhaps that which most makes probation revocation proceedings criminal prosecutions is that like an initial prosecution, "a probation revocation usually leads to sentencing . . ." *Hicks, supra*, So.2d at 24, n.

The instant defendant received sentences totaling 20 years (R-162; 165). It is in large part for the reason that a probationer may be imprisoned that the defense suggests that the *Crawford* holding should apply to VOP proceedings.

Perhaps most striking in all of the case law related to the instant issue is the following passage from *Gagnon* in which the Court contrasts criminal trial and VOP characteristics:

> In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In Short [sic], a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole.

Id., 411 U.S. at 789, 93 S.Ct. at 1763.

It is beyond serious dispute that under the Supreme Court's definitions Florida's VOP proceedings are criminal prosecutions. Therefore, the sixth amendment right to confrontation under *Crawford* should apply to probationers at revocation hearings.

The courts that have held that *Crawford* is inapplicable to VOP revocation hearings point to the due process clause for any right to confrontation for

probationers facing such a hearing.[7] For example, in *Abd-Rahmann, supra*, the Washington Supreme Court stated in pertinent part:

> The confrontation clause of the Sixth Amendment explicitly applies to "criminal prosecutions." The United States Supreme Court and this court have recognized the different due process requirements existing in parole revocation hearings as opposed to the right of confrontation in criminal prosecutions. For the purposes of confrontation, the former are analyzed under the Fourteenth Amendment, while the latter are analyzed under the Sixth Amendment.

Id., at 1160.

Along those same lines, "It is clear at least after *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe v. Zerbst*, 295 U.S. 490, 492, 55 S.Ct. 818, 819, 79 L.Ed. 1566 (1935), that probation is an 'act of grace.'" *Gagnon*, U.S., at 782, n. 4, S.Ct., at 1760. This Court has held similarly:

> The Supreme Court of the United States in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), and *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972), has held that a probationer in a probation revocation proceeding is not entitled to the full panoply of rights guaranteed a defendant in a criminal proceeding. He is entitled

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[7]The defense acknowledges that the case law is almost uniformly against its position on the issue of the applicability of *Crawford* in the VOP setting. *See*, *e.g.*, *Peters v.* State, 919 So. 2d 625 (Fla. 1st DCA, *review granted*, 924 So. 2d 809 (Fla. 2006); *State v. Abd-Rahmann*, 154 Wash.2d 280, 111 P.3d 1157 (2005); *Commonwealth v. Wilcox*, 446 Mass. 61, 841 N.E. 1240 (2006); *United States v. Kelley*, __F.3d__, 2006 WL 1149187 (7th Cir. 2006); *contra*, *Pearl, supra.*

> only to minimal due process rights. These minimal rights are written notice of the claimed violation of probation, disclosure of the evidence against him, an opportunity to be heard in person and to present witnesses and documentary evidence, ***the right to confrontation and cross-examination of adverse witnesses***, a neutral and detached hearing body, and a written statement by the fact finders as to the evidence relied on and the reason for revoking probation. *Gagnon v. Scarpelli*, 411 U.S. at 786, 93 S.Ct. at 1761.
>
> *Cuciak, supra*, (emphasis added), *citing Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *see also Black, supra*, U.S. at 612, S.Ct. at 2258.

In closing, the *Crawford* holding should apply to VOP revocation hearings because they possess most of the characteristics of a criminal prosecution, including the potential for additional incarceration.

CONCLUSION

This Court should approve the decisions of the Second and Fourth District Courts of Appeal that hold that mere hearsay coupled only with a visible injury is inadequate to establish a VOP. Additionally, this Court should rule that the confrontation holding in *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004), is applicable to VOP hearings.

Respectfully submitted,

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CERTIFICATE OF FONT

I certify that the font used in this brief is 14 point proportionally spaced Times New Roman.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief has been hand delivered to the Honorable Charles J. Crist, Jr., Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Anthony K. Russell, Inmate # U16516, G-1-21-U, Liberty Correctional Institution, 11064 N.W. Dempsey Barron Road, Bristol, Florida 32321-9711, on this ____ day of May 2006.

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