IN THE SUPREME COURT OF FLORIDA

ROBERT SHELDON PETERS,

Petitioner,

v. **CASE NO. SC06-341**

STATE OF FLORIDA,

Respondent.

______________________________/

AMENDED SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
ISSUE PRESENTED THE FIRST DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004) HAS NO APPLICATION TO COMMUNITY CONTROL OR PROBATION REVOCATION PROCEEDINGS.	
CONCLUSION	10
CERTIFICATE SERVICE	10
CERTIFICATE OF FONT SIZE	10

TABLE OF CITATIONS

CASE(S) **PAGE(S)**

Case	Page(s)
Crawford v. Washington, 541 U.S. 36 (2004)	2,3,4,5,6,9
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	4,5,6
Green v. State, 463 So. 2d 1139, 1140 (Fla. 1985)	5
Johnson v. State, 929 So. 2d 4 (Fla. 2nd DCA 2005)	9
Morrissey v. Brewer, 408 U.S. 471 (1972)	4,5,6
Poore v. State, 531 So. 2d 161 (Fla. 1988)	6,7
Powell v. State, 703 So. 2d 444 (Fla. 1997)	6

AMENDMENTS AND STATUTES

Authority	Page(s)
Sixth Amendment	2,5,6,7,8
Section 948.01(2), Fla. Stat. (2004)	5

RULES

Authority	Page(s)
Rule 3.790, Fla. R. Crim. P.	6

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SUPPLEMENTAL BRIEF OF PETITIONER

STATEMENT OF THE CASE AND FACTS

Peters relies on the statement of the case and facts presented in the initial brief.

SUMMARY OF THE ARGUMENT

At oral argument in this case, Justice Pariente asked if a defendant on probation had any Sixth Amendment rights at a probation revocation hearing before Crawford v. Washington, 541 U.S. 36 (2004) was decided. Until then, probationers had only the rights afforded by the Fourteenth Amendment's Due Process Clause. They apparently had no Sixth Amendment rights because, relying on United States Supreme Court precedent, probation was considered outside the Sixth Amendment's "criminal prosecution" limitation. In Florida , however, probation is part of the sentencing, and sentencing itself is part of the criminal prosecution. Thus, in this state, probation revocation hearings, as a deferred sentencing, come within the Sixth Amendment's protections.

This conclusion holds regardless of the various sentencing options a trial judge may have. If the court places him on probation with or without some prison time also imposed, any subsequent revocation hearing is still part of the criminal prosecution.

This argument is not affected by the Sixth Amendment right that defendants also enjoys the right to a jury trial. Probationers have had that right at trial, but as the probation revocation is part of sentencing, not the trial, he has no right to a jury at the sentencing.

Thus, a defendant at probation revocation hearing has all the rights he or she would have at a sentencing.

Finally, Justice Pariente asked about the admissibility of the laboratory reports regardless of Crawford. Such evidence, which is prepared for litigation, is inadmissible. Moreover, under Crawford it would have been considered testimonial and hence inadmissible.

ARGUMENT

ISSUE PRESENTED:

THE FIRST DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004) HAS NO APPLICATION TO COMMUNITY CONTROL OR PROBATION REVOCATION PROCEEDINGS

At the end of the oral argument in this case, Chief Justice Lewis invited counsel to submit supplemental briefs on the applicability of the Sixth Amendment's Confrontation Clause to probation/community control revocation hearings. At that time appellate counsel declined the offer, but on reflection, he would like to belatedly accept it.

Accordingly, he files this supplemental brief to answer some of the questions that were raised at the Oral argument.

Justice Pariente asked if there were any Sixth Amendment right to confrontation at probation revocation hearings before Crawford v. Washington? Peters can find no Florida case that held that the Sixth Amendment's right to confrontation applied to probation revocation hearings. And that is not surprising because until Crawford, defense counsel had no reason to believe a defendant had any more rights than those conferred by the Fourteenth Amendment's due process clause. Indeed, the United States Supreme Court's opinions in Morrissey v. Brewer 408 U.S. 471 (19 72) and Gagnon v. Scarpelli, 411 U.S. 778 (1973) were seen as

victories for defendants because they recognized that defendants had at least some due process rights at parole and probation revocation hearings.

The glow of victory dimmed with the arrival of Crawford and its emphasis on a close reading of the Sixth Amendment. Then the language of Morrissey became a curse or limit, at least to the extent that defendants sought to extend the holding of Crawford to probation revocation hearings. "We begin with the proposition that the revocation of parole is not part of a criminal prosecution. . . .Parole arises after the end of the criminal prosecution, including imposition of sentence." Morrisey at 480 Gagnon, at 782, f.n. 3. Thus, for defendants in most states and in the federal system, Morrissey and Gagnon foreclosed extending Crawford to those proceedings.

Yet, a closer reading of the quoted language forced Florida lawyers to more carefully examine the law in this State. That is, because a criminal prosecution includes not only a trial but a sentencing as well, See Initial brief at p. 14 and the Reply Brief at pages 6-7, was pro bation, as defined by Florida law, controlled by Morrissey? In this state, probation is not outside a criminal prosecution, but is part of it because it is a deferred sentencing. Green v. State, 463 So. 2d 1139, 1140 (Fla. 1985); Section 948.01(2), Fla. Stats. (2004) (If it appears that the defendant is amenable to probation, the court "shall stay and withhold imposition of sentence upon

such defendant and shall place him on probation."); Rule 3.790 Fla. R. Crim. P. (Once the court has revoked a defendant's probation, "imposition of sentence shall then be made on the defendant.").

In that sense Florida differs from other states and the federal system, which are controlled by the assumptions of Morrissey and Gagnon that parole and probation are not part of the criminal prosecution. Here, a probation revocation hearing is part of the Sixth Amendment's criminal prosecution because it is part of the sentencing.

Justice Bell then pushed the logic of this argument by asking whether Crawford applied to a "true split sentence." The broader implications of that question are whether Crawford applies to any or all of the sentencing options described in Poore v. State, 531 So. 2d 161 (Fla. 1988) and modified by Powell v. State, 703 So. 2d 444 (Fla. 1997)? In Poore, this Court described the five sentencing options a trial court had:

> Thus, we conclude that a judge has five basic sentencing alternatives in Florida: (1) a period of confinement; (2) a "true split sentence" consisting of a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation for that suspended portion; (3) a "probationary split sentence" consisting of a period of confinement, none of which is suspended, followed by a period of probation; (4) a *Villery* [1] sentence, consisting

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[1] Villary v. Florida Parole & Probation Commission, 396 So. 2d 1107 (Fla.1981)

of period of probation preceded by a period of confinement imposed as a special condition; and (5) straight probation.

Poore at p. 164.

Under any of the sentencing options, whenever the sentencing court can require the defendant to serve some period of his "sentence" on probation, the sentence remains deferred and the Sixth Amendment applies because sentencing is part of the criminal prosecution. That is, we can look at probation as a period in which the trial court is unsure whether the defendant needs to go to prison, and it would like some more information to make an informed sentencing. Probation is the tool it uses to do that. That is, by giving the defendant a limited amount of freedom, the judge gives the defendant the opportunity to prove whether he or she can live in society without breaking any laws. If they abide by the conditions of probation, they are free. If not, the defendant, by what he or she has done on probation, has justified the court in revoking it and sending him or her to prison. Thus, probation becomes a deferred sentencing.

In short, in Florida, the criminal prosecution ends when the defendant no longer is on probation. 2

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[2] In Powell, this Court recognized that the legislature had created a "reverse split sentence." That is, a court could impose a probationary period followed by a period of incarceration. But, "With such a reverse split sentence, it is obvious the legislature expects that the court will eliminate the

Justice Bell further probed the logic of Peters' argument by asking "If the Sixth Amendment applies to probation revocations, does the right to a jury also apply?" The Sixth Amendment applies to criminal proceedings. They include not only the trial, which determines a defendant's guilt, but also the sentencing. The defendant has had his Sixth Amendment jury at the trial. Historically, juries, in non capital cases, determine only a defendant's guilt. Sentencing, on the other hand, has been an exclusively judicial function. Thus, the defendant has had the benefit of the Sixth Amendment's right to a jury trial when the jury determined his guilt or innocence. He is not entitled, as a matter of Sixth Amendment law, to a jury trial at sentencing. 3 Justice Anstead, following the logic of Justice Bell's question, mentioned that a defendant has reduced rights in a probation revocation hearing. But, as noted on pages 9-12 of the Initial Brief, the defendant has most of the rights afforded a person at a trial. Indeed, the only Sixth Amendment rights

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term of incarceration if the defendant complies with the terms of probation." Id. at 446, quoting State v. Powell, 696 So. 2d 789, 791092 (Fla. 2nd DCA 1997). Peters argument regarding the Poore sentencing options applies to this legislatively created choice as well.

[3] Justice Bell's question also raises the broader question of what other Sixth Amendment rights apply specifically to a probation revocation hearing. In this State, he or she has the right to "be informed of the nature and cause of the accusation,. . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel."

not afforded him, at least until this case, were the right to a jury and the right to confront his accusers.

Justice Pariente asked questions about the admissibility of laboratory reports regardless of Crawford. In his Initial Brief at pages 27-29, Peters argued that the report in his case was prepared in anticipation of litigation, and hence, was inadmissible. He also noted on page 29 of his brief that under Crawford the evidence would have been considered testimonial and, because of that, inadmissible unless he had an opportunity to confront the person who wrote the report.4 See, Johnson v. State, 929 So. 2d 4 (Fla. 2nd DCA 2005).

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[4] Peters acknowledges that at trial he did not challenge the admissibility of the report as a business record. Peters v. State, 919 Sop. 2d 624, 626 (Fla. 2006). "No objection was raised concerning any failure by the State to comply with the statute setting forth the requirements for admission of a business record."

CONCLUSION

For the reasons presented in this, the Initial, and the Reply briefs, as well as at oral arguments, the Appellant, Robert Peters, respectfully asks this honorable court to reverse the opinion of the First District Court of Appeal and remand with instructions that the trial court either reinstate him to probation or conduct another revocation hearing consistent with the ruling in this case. Peters also sincere ly appreciates the Chief Justice's invitation to file this supplemental brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was furnished by U.S. mail to Giselle Rivera, Assistant Attorney General, PL-01, Tallahassee, FL 32399-1050; and to Mr. Robert Peters, 3731 Collinsworth Road, Westville, FL 32454, on this ____ day of October, 2006.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that pursuant to Rule 9.210(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

Respectfully submitted,
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