IN SUPREME COURT OF FLORIDA

ROBERT SHELDON PETERS,

Petitioner,

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

STATE OF FLORIDA,

Respondent.
______________________________/

PRELIMINARY STATEMENT

Appellant was the defendant in the trial court and will be referred to herein as either "defendant," "appellant," or by his proper name. References to the record shall be by the volume number in Roman numerals, followed by the appropriate page number, both in parentheses.

STATEMENT OF THE CASE AND FACTS

Peters relies on the Statement of the Case and Facts presented in his Initial Brief.

ARGUMENT

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

The State, in the "Merits" part of its Supplemental Answer Brief raises three arguments, which Peters will respond to.

1. Probation revocation hearings are not part of the criminal prosecution. (Respondent's Brief at p. 4-8). On page five of its brief, the Respondent quotes from Morrissey v. Brewer, 408 U.S. 471 (1972) for the proposition that parole is not part of the criminal prosecution. Significantly, in the middle of the quote, the State omitted part of what the Supreme Court had said, and it is that omission that is crucial to Peter's argument that probation, in Florida, is part of sentencing. In Morrissey parole is not part of the criminal prosecution because, as the missing part of the quote makes clear: "Parole arises after the end of the criminal prosecution, including sentencing." In Florida, as this Court said in Green v. State, 463 So.2d 1139, 1140 (Fla. 1985), and the legislature declared by section 948.01(2), Fla. Stats. (2004), probation is part of the sentencing. Indeed, as this Court said in Green, probation is a deferred sentencing.

In fact, this Court recently reaffirmed this position, though in a different context, in Teal v. State, Case No. SC04-102 (Fla. Oct. 5, 2006):

> The present case involves the sanction of community control. For the same reasons that we found probation to be a "sentence" in Richardson v. State, 884 So.2d 950 (Fla. 4th DCA 2003)] we hold that the sanction of community control is a "sentence" for purposes of applying the sequential conviction requirement.

Thus, Morrisey and Gagnon v. Scarpelli, 411 U.S. 778 (1973) apply to Florida to the extent that parolees and probationers have at least the "minimum" due process rights mentioned in those cases. In Florida, however, they have far more rights, as indicated on pages 9-12 of the Initial Brief. Indeed, while "diminished rights" seems to be the mantra we all hum when talking about probation, it is perhaps an incantation that has outworn its usefulness, and misleads rather than directs the inquiry. That is, except for the admissibility of hearsay (which is at issue here), the reduced standard of proving a probation violation, and the absence of the jury, probationers enjoy the same Fourth, Fifth, and Sixth Amendment rights as someone facing a trial for first degree murder or simple trespass.

2. Crawford did not hold that the Sixth Amendment right to confrontation applied to probation revocation hearings. So what? That was not the issue before it. In that case, the question arose as to the admissibility of certain hearsay testimony at trial. Trials are obviously part of the criminal

prosecution, and the court had no reason to discuss the first clause of the Sixth Amendment, that "In all criminal prosecutions, ..." The First District in this case, however, concluded that probation was not part of the criminal prosecution, and that is the issue before this Court. While nothing in Crawford may have altered the standards of Morrisey or Gagnon, (Respondent's brief at p. 8), that is a red herring, Those cases have no relevance to Florida probationers because, unlike the situation in the federal system, probation is a part of the sentencing process.

3. Revocation proceedings are not the functional equivalent of sentencing. The State denigrates Peters' reference to a footnote in Gagnon in support of his argument that probation is a part of sentencing in Florida. Even if it is the poor cousin of the opinion's text, it still has relevance. More importantly, in Morrisey, the court, in the main text, said "Parole arises after the end of the criminal prosecution, including the sentence." Id. at 480.

The State, on page 13 of its brief, argues that even if Peters is correct on his Sixth Amendment argument, nothing prevented him from calling the person who prepared the report. Well, yes there is, Crawford rests on the presumption of the unavailability of the hearsay declarant. In this case, that was the person who prepared the report. He or she was unavailable.

Moreover, even in probation revocation hearings the State has the burden to prove its case. The defendant has no obligation to prove his innocence.

On the same page, the State says that Peters conceded the lab report was admissible as a business record. Although trial counsel apparently did not challenge the admissibility of the report, on pages 24-29 of the Initial Brief, Peters said it was not a business record, as that term was contemplated by the framers of the Constitution or the United States Supreme Court in Crawford. In other contexts, t his Court has permitted the State, by way of a supplemental brief, to raise issues before this Court that it had conceded at the trial level and even in its Answer Brief. Thomas v. State, 894 So.2d 126 (Fla. 2004)(In a death case, the defendant's mental retardation, which the prosecution had conceded at trial, and which the trial court had found as a mitigator, could, nonetheless, be challenged by the State for the first time, on appeal, in its supplemental brief.). Using what this Court did in Thomas, Peters can raise this issue, even if trial counsel failed to challenge the admissibility of the lab report.

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail to Giselle Rivera, Assistant Attorney General, at The Capitol, Tallahassee, FL 32399; and to Robert Peters, 3731 Collinsworth Road, Westville, FL 32464, on this _____ day of October, 2006.

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a) (2).

Respectfully submitted,

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SUPPLEMENTAL REPLY BRIEF

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