IN THE SUPREME COURT OF FLORIDA

ROBERT SHELDON PETERS,

Petitioner,

Case No. SC06-341

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT R. WHEELER
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 0796409

GISELLE LYLEN RIVERA
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Robert Sheldon Peters, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

The record on appeal consists of two volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner’s statement of the case and facts as being generally supported by the record as it is taken virtually verbatim from the First District Court of Appeal decision in Peters v. State, 919 So. 2d 624 (Fla. 1st DCA 2006).

SUMMARY OF ARGUMENT

Petitioner contends that the District Court of Appeal erred in affirming the trial court's order revoking his community control or probation by holding that Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) does not apply to admission of a business record of an independent laboratory at a community control revocation hearing. He asserts that the decision below was incorrect because: 1) revocation proceedings are criminal prosecutions for purposes of the Sixth Amendment, 2) revocation proceedings are a part of sentencing which requires the right to confrontation, 3) due process grants him the right to confront witnesses against him, and 4) the laboratory report was not a business record. The State respectfully disagrees.

Because Petitioner's objection at the trial court level was limited to his claim that admission of the report violated his right of confrontation pursuant to Crawford, only this aspect of the claim is preserved for review.

Petitioner may not prevail on the merits. Because the Sixth Amendment right to confrontation does not apply to probation revocation proceedings, Crawford does not apply. The due process clause grants Petitioner a more limited right of confrontation in probation revocation hearings, but that right requires

application of a much more flexible standard that recognizes that evidence which is ordinarily not admissible at trial, is permissible in such proceedings.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN REVOKING PEITIONER'S COMMUNITY CONTROL BY HOLDING THAT CRAWFORD V. WASHINGTON, DOES NOT APPLY TO ADMISSION OF A BUSINESS RECORD OF AN INDEPENDENT LABORATORY AT A COMMUNITY CONTROL REVOCATION HEARING? (Restated)

Petitioner contends that the District Court of Appeal erred in affirming the trial court's order revoking his community control or probation by holding that Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) does not apply to admission of a business record of an independent laboratory at a community control revocation hearing. He asserts that the decision below was incorrect because: 1) revocation proceedings are criminal prosecutions for purposes of the Sixth Amendment, 2) revocation proceedings are a part of sentencing which requires the right to confrontation, 3) due process grants him the right to confront witnesses against him, and 4) the laboratory report was not a business record. The State respectfully disagrees.

Standard of Review

The issue of whether the trial court properly admitted the laboratory report in evidence during Petitioner's violation of community control hearing as not being in violation of Crawford

v. Washington, infra is a pure question of law reviewed utilizing the de novo standard. Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000).

Preservation

At his community control revocation hearing, Petitioner argued only that admission of the lab report violated his right to confrontation pursuant to Crawford. (II, 5-6). As such, only this aspect of the claim, which addresses his Sixth Amendment right of confrontation is preserved. The remainder of his claim was not argued below and is not preserved for review. "For an issue to be preserved for appeal, . . . it 'must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved. Archer v. State, 613 So. 2d 446, 448 (Fla. 1993) (quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); see also Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).'" Perez v. State, 919 So. 2d 347, 359 (Fla. 2005).

Argument

Petitioner contends that the District Court of Appeal erred in affirming the trial court's order revoking his community control or probation by holding that Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) does not apply to admission of a business record of an independent laboratory

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Revocation Proceedings are Not Criminal Prosecutions for Purposes of the Sixth Amendment

The United States Supreme Court, in Crawford v. Washington, supra, held that in the trial of a criminal case, an out-of-court testimonial statement is prohibited by the Sixth Amendment Confrontation Clause unless the witness is unavailable and the defendant has, or previously had, the opportunity to cross-examine him. 124 S. Ct. at 1369 n.9. The Confrontation Clause gives an accused the right to be confronted with the witnesses against him in criminal prosecutions. U.S. Constitution, Amendment VI. However, it has long been established that "probation revocation, like parole revocation, is not a stage of a criminal prosecution." Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S. Ct. 1756, 36 L.Ed.2d 656 (1973); see Morrissey v. Brewer, 408 U.S. 471, 480, 92 S. Ct. 2593, 33 L. Ed.2d 484 (1972)

("revocation of parole is not part of a criminal prosecution"); United States v. Aspinall, 389 F.3d 332, 342 (2d Cir. 2004), abrogated on other grounds, United States v. Fleming, 397 F.3d 95, 999 n.5 (2d Cir. 2005), (holding that Crawford does not apply to probation revocation because it, and the Sixth Amendment, apply only to "criminal prosecutions" and "it has long been established that probation revocation, like parole revocation, is not a stage of a criminal prosecution."); United States v. Martin, 382 F.3d 840, 844 n.4 (8th Cir. 2004) (holding that the confrontation right in criminal prosecutions does not apply to supervised release revocation proceedings because they are not part of a criminal prosecution).

The overwhelming majority of federal courts which have considered the issue have agreed with this analysis. United States v. Zayas, 146 Fed. Appx. 346, 350 (11th Cir. 2005) (Crawford neither altered the requirements under Morrissey or Scarpelli, nor suggested that the principles of the confrontation clause were applicable to revocation of probation proceedings); United States v. Hall, 419 F.3d 980, 986 (9th Cir.) ("We, like the two circuits that have also addressed this question, see no basis in Crawford or elsewhere to extent the Sixth Amendment right of confrontation to supervised release proceedings"); United States v. Kirby, 418 F.3d 621, 627-28 (6th

Cir. 2005); United States v. Barazza, 318 F. Supp. 2d 1031, 1033-36 (D. Cal. 2004). Similarly, numerous state courts around the country that have had the opportunity to address the question have reached the same conclusion. See for example Minnesota v. Przyborowski, 2004 Minn. App. LEXIS 835 (Ct. App. 2004); People v. Johnson, 121 Cal. App. 4th 1409, 18 Cal. Rptr. 3d 230 (Cal. 1st DCA 2004).

In State v. Abd-Rahmann, 111 P.3d 1157 (Wash. 2005) for example, a case heavily relied upon by First District Court of Appeal, the court rejected Abd-Rahmann's claim that the rule articulated in Crawford should apply to his right to confront witnesses at a sentence modification hearing because the right to confront a witness in a parole revocation hearing under Morrissey incorporates the guarantees of the Sixth Amendment. The Abd-Rahmann Court held:

> The confrontation clause of the Sixth Amendment explicitly applies to "criminal prosecutions." The United States Supreme Court and this court have recognized the difference due process requirements existing in parole revocation hearings as opposed to the right to 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. By its own terms, the guaranties [sic] of the Sixth Amendment do not apply in these post-conviction settings, but to "criminal prosecutions." Id. At 1160-61.

Those Florida Courts which have considered the claim have reached the same result. See: Russell v. State, 920 So. 2d 683 (Fla. 5th DCA 2006) (Rejecting appellant's claim that his probation was improperly revoked because the revocation was based solely on otherwise inadmissible hearsay evidence, holding that Crawford does not apply to revocation of supervised release proceedings); Sproule v. State, 2006 Fla. App. LEXIS 4422, 31 Fla. L. Weekly D930 (Fla. 4th DCA March 29, 2006) (Rejecting appellant's claim that admission of his driving record at trial was hearsay and a violation of his Sixth Amendment right to confront and cross-examine under Crawford, holding that Crawford does not alter the law regarding nontestimonial material that qualifies as a firmly rooted exception to the hearsay rule.)

The Due Process Right to Confrontation is a Limited One Which Does Not Equate to That Extended Under the Sixth Amendment

The rationale applied by these courts recognizes that in Crawford, the Supreme Court addressed the Sixth Amendment right of the accused in criminal prosecutions to confrontation. The text of that amendment specifically provides that it applies in all criminal prosecutions. The Court, in Morrissey observed that "there is no thought to equate . . . {a} parole revocation to a criminal prosecution in any sense. 408 U.S. at 489; Scarpelli ("probation revocation, like parole revocation, is not a stage

of a criminal prosecution…" 411 U.S. at 782. Crawford therefore did not address the due process rights attendant to post-conviction proceedings for violations of conditions of release. See 2A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Criminal § 412 (3d ed. 2000 & Supp. 2005); United States v. Hall, 419 F.3d 980, 986 (9th Cir. 2005); United States v. Kirby, 418 F.3d 621, 627-28 (6th Cir. 2005).

Second, it is established that at a revocation proceeding, a trial court may consider evidence that would be inadmissible in a criminal prosecution. As noted in Morrissey, the parole revocation process "should be flexible enough to consider evidence including letters, affidavits,, and other materials that would not be admissible in an adversary criminal trial." 408 U.S. at 489.

Finally, all of the courts, both federal and state, have found that nothing in Crawford suggested that it applied to probation revocation proceedings. United States v. Kirby, 418 F.3d at 628.

The Sixth Amendment Right to Confrontation Does Not Apply to Sentencing Proceedings

Next appellant contends that a probation revocation proceeding is akin to sentencing proceedings for purposes of his confrontation rights. However, a plethora of cases from the

majority of federal circuit courts have held that the Confrontation Clause does not apply to sentencing procedures. United States v. Lopez, 898 F.2d 1505, 1512 (11th Cir. 1990); United States v. Beaulieu, 893 F.2d 1177, 1180 (10th Cir. 1990); United States v. Giltner, 889 F.2d 1004, 1007 (11th Cir. 1989); United States v. Agyemang, 876 F. 1264, 1271 (7th Cir. 1989); United States v. Carmona, 873 F.2d 569, 574 (2d Cir. 1989); United States v. Silverman, 976 F.2d 1502, 1514 (6th Cir. 1992); United States v. Mata, 145 Fed. Appx. 276, 279 (10th Cir. 2005) (Crawford applies to the right to confrontation at trial, not sentencing). Also see Russell v. State, 920 So. 2d at 684 in which the Fifth District Court of Appeal held that Confrontation Clause protections do not extend to revocation or sentencing proceedings; State v. Abd-Rahmann.

Appellant contends that even if the Sixth Amendment does not apply in this case, his due process rights nonetheless entitled him to confront the evidence against him. In Morrissey, however, the United States Supreme Court recognized that although a defendant is entitled not to have his parole revoked without due process, "the full panoply of rights due a defendant in [a criminal prosecution] does not apply to parole revocations." 408 U.S. at 480-82. Later, the Court held that the

same principles applied to revocation of probation proceedings. Scarpelli, 411 U.S. at 782 and n. 3,4.

The minimum due process right afforded in such proceedings includes the right to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation but, those proceedings should not be equated to "a criminal prosecution in any sense," and the "process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." Morrissey, 408 U.S. at 489.

In United States v. Bell, 785 F.2d 640 (8th Cir. 1986), the court devised a test to determine whether evidence admitted at a probation revocation hearing violated a defendant's limited right to confront and cross-examine adverse witnesses. To comport with the requirements of Morrissey, a court must balance the probationer's right to confront a witness against the grounds asserted by the government for not requiring confrontation. In so doing, the court must first consider the explanation offered by the government as to why confrontation was undesirable or impracticable and, second, the reliability of the evidence which is offered in lieu of live testimony. Where the government demonstrates that the burden of providing live

testimony would be inordinate and hearsay evidence of demonstrable reliability, a strong showing of good cause is made. Bell, at 642-43; Martin at 844. See also: Minnesota v. Przyborowski, supra.

Here, the record in question was a report of an independent laboratory. First the State submits that the report was not testimonial as that term was intended under Crawford. While Crawford did not draw an exact definition or define a class of statements that are testimonial in nature, the Court acknowledged that various formulations of what qualifies as testimonial has been made. The decision noted that the petitioner in that case described such statements as "ex parte in-court testimony or its functional equivalent - - that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." 541 U.S. at 51-52; 124 S. Ct. at 1364. It also referred to its prior opinion in White v. Illinois, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L. Ed.2d 848 (1992) in which the Court classified testimonial statements as those which included "extrajudicial statements … contained in formalized testimonial material such as affidavits, depositions, prior testimony, or confessions." The broadest of definitions,

provided by the National Association of Criminal Defense Lawyers, defined testimonial statements as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 541 U.S. at 52; 124 S. Ct. at 1364. All of the examples set forth in Crawford share an 'official' element in that the statements were made to an authority figure in an authoritarian environment. United States v. Savoca, 335 F. Supp. 2d 385, 392-394 (D. N.Y. 2004).

In contrast, in this case, the report was the result of testing performed by an independent laboratory. Not only was the statement at issue not made in an authoritarian environment, it is not reasonable to believe the laboratory technician who performed the test and reported his results understood that the report would be available for use at a later trial. Clearly, the only expectation of either the lab or the technician was to be paid for work performed.

Where non-testimonial hearsay is at issue, Crawford allows the court to either 1) follow the inquiry process as set forth in Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed.2d 597 (1980), or 2) exempt such evidence from a Confrontation Clause analysis. In applying a Roberts style analysis, the proponent of the evidence satisfies its burden of showing that

the admission of the evidence does not violate a defendant's rights under the Confrontation Clause by showing the evidence 1) falls within a firmly rooted hearsay exception, or, 2) contain particularized guarantees of truthfulness.

Here, the report at issue was a laboratory report from an independent company which was prepared in the ordinary course of the company's business. While Petitioner challenges admission of the report as a business record before this Court, as recognized by the First District Court of Appeal, Petitioner never challenged an alleged failure by the State to comply with the statute setting forth the requirements for admission of a business record. Peters v. State, 919 So. 2d at 626. As such, he may not challenge its admission on this basis before this Court.

Even if that were not the case, the document was properly admitted as a business record which also clearly bore the particularized guarantees of trustworthiness which authorized its admission pursuant to Roberts. First, the report qualified for admission pursuant to F.S. 90.902(11) which provides that:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for:
> (11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying of declaring that the record:

> (a) Was made at or near the time of the occurrence of the matters set forth by, or form information transmitted by, a person having knowledge of those matters;
> (b) Was kept in the course of the regularly conducted activity; and
> (c) Was made as a regular practice in the course of the regularly conducted activity, provided that falsely making such certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.

In turn, F.S. 90.803(6)(a) provides that

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term “business” as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The Pharmchem report included a certification executed by the records custodian of Pharmchem who certified that the records were company records kept in the ordinary course of business, at or near the time of the events described, by a person with knowledge of the events. (I, 74-75). The

certification thus complied with statutory requirements for admission as a self-authenticating document.

Additionally, not only did the certification comply with the statutory requirements, the evidence itself bore particularized guarantees of trustworthiness. Pharmchem had no interest whatsoever in the outcome of the test results, be they positive or negative. The tests were conducted and the results reported in the same manner they would have been done, regardless of the person or entity who requested that they be performed. Additionally, the test results were neither discretionary nor based upon opinion of the person performing it; instead, it merely stated the results of a well-recognized scientific test. Commonwealth v. Verde, 444 Mass. 279, ___ N.E. ___ (Mass. 2005). No motive existed to falsify the results. In fact, because the tests were conducted in the ordinary course of business, the company had every reason to ensure the tests were properly conducted and the results, whatever they were, properly reported. Clearly the company's sole motivation was to ensure that its work was accurate and therefore its reputation remained good in the business community.

Finally, public policy supports the lower court's decision which recognized that:

> …a decision by this court declaring Crawford applicable in community supervision revocation

> proceedings would result in prejudice to the State far outweighing any perceived confrontation violations suffered by an accused probation or community control violator. This is true because in the overwhelming majority of such cases the nature of the illegal substance is not at issue. Under the present system affidavits are accepted without objection. Were we to accept appellant's position, defense attorneys would object to the admission of written lab reports in revocation proceedings, even when there was no dispute concerning the nature of the substance, if the analyst who prepared the report was not present to testify as to the findings set forth in the report. As a result, the State would be put to great expense even though in most cases the defendant would suffer no prejudice from the admission of the written report. In those cases where there is a true dispute concerning the nature of the substance, and the defense can show some lack of trustworthiness in the lab report, the report will be inadmissible. See s. 90.803(6)(a), Fla. Stat.

For all of these reasons, the Respondent submits that the District Court properly found that the trial court did not err in finding that admission of the laboratory report did not violate the principles enunciated in Crawford. It therefore asks this Court to affirm.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at 919 So. 2d 624 should be approved, and the order revoking appellant's community control as entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to David A. Davis, Esquire, Assistant Public Defender, Counsel for Petitioner, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on the _____ day of May, 2006.

Respectfully submitted and served,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
ROBERT R. WHEELER
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0796409

_____
GISELLE LYLEN RIVERA
Assistant Attorney General
Florida Bar No. 0508012

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)

[AGO# L06-1-6438]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Giselle Lylen Rivera
Attorney for State of Florida

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APPENDIX

Peters v. State, 919 So. 2d 624 (Fla. 1st DCA 2006).