IN THE SUPREME COURT OF FLORIDA

ROBERT SHELDON PETERS,

Petitioner,

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

STATE OF FLORIDA,

Respondent.

_____/

INITIAL BRIEF

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 First District's opinion in his case regarding the facts and procedural history of his case:

> In July 2003, the trial court placed appellant on twelve months' community control in lieu of a suspended sentence of twenty-four months in state prison. Condition (6) of appellant's community control stated: "You will not use intoxicants to excess or possess any drugs or narcotics unless prescribed by a physician; nor will you visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed or used."
>
> In April 2004, the State charged appellant with having violated his community control by failing drug tests for amphetamines and methamphetamines. At the violation hearing, appellant's community control officer testified that in April 2004 appellant had provided her with a urine sample upon request; she sent the sample for testing to PharmChem, a laboratory used statewide by the Department of Corrections; and the results of the test were positive for amphetamines.
>
> A "Certification and/or Declaration of Authenticity as Business Record pursuant to 90.803(6) Fla. Evid.Code" was presented with PharmChem's lab report of the results of the drug test in lieu of testimony from the custodian of PharmChem's records. Such a certification or declaration is an acceptable means of authenticating a business record under a 2003 legislative amendment to the business records exception to the hearsay rule. *See* ch. 2003-259, § 2, at 1299, Laws of Fla.; *see also* § 90.803(6)(a), Fla. Stat. (2003) (providing for admission of business records upon testimony of the custodian of the records, "or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11)").
>
> Defense counsel objected to the trial court's consideration of the written results of PharmChem's analysis on grounds that the admission of the results violated appellant's right to confrontation as set forth in Crawford and because under Monroe v. State, 679 So.2d 50 (Fla. 1st DCA 1996), and Williams v. State, 553 So.2d 365 (Fla. 5th DCA 1989), hearsay evidence cannot form the sole basis for a

> finding of a violation of community supervision. 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.

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

The First District affirmed the trial court's order revoking Peter's community control, holding that the United State's Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004) had no applicability to community control or probation revocation proceedings:

> Appellant argues that the admission of a business record of an independent laboratory at a community control revocation hearing violated his constitutional right to confrontation as set forth in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). We reject that contention because Crawford did not abrogate the rule enunciated by this court in Davis v. State, 562 So.2d 431 (Fla. 1st DCA 1990), that written laboratory reports from independent labs setting forth the results of drug tests are admissible in community supervision revocation proceedings.

Nonetheless, the court, recognizing that Peters had presented a novel issue, certified, as a question of great public importance:

> DOES THE "TESTIMONIAL HEARSAY" RULE SET FORTH IN CRAWFORD V. WASHINGTON, 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (2004), APPLY IN COMMUNITY CONTROL AND/OR PROBATION REVOCATION PROCEEDINGS?

This Court accepted jurisdiction, and Peters now asks it to reverse the First District's holding and rule that Crawford applies to hearings to determine if a defendant's community control or probation should be revoked.

SUMMARY OF THE ARGUMENT

Peters has several reasons this Court can use to reject the holding and reasoning of the First District's opinion. First, a probation revocation hearing, particularly as they are conducted in Florida, is a "criminal prosecution" as used in the Sixth Amendment. Except for relaxing some of the rules of evidence at those hearings, revocation proceedings have all the markings of a Sixth Amendment adversarial trial.

Second, a prosecution for violating probation is part of sentencing, which itself is part of the criminal prosecution that requires confrontation. In fact, a revocation hearing is nothing more than a "deferred sentencing," as this Court has held.

Additionally, even if a defendant has no Sixth Amendment right to cross examination, he or she has a Fourteenth Amendment due process right to do so, and that right, except in very narrow instances, is as broad as that recognized by the Sixth Amendment.

Finally, the laboratory report used in this case could not be classified as a business record, and thus exempt from the confrontation requirements imposed by the Sixth Amendment. First, the framers of the Constitution would never have recognized it as such. Second, the report was prepared for litigation and because of that was inadmissible.

ARGUMENT

ISSUE PRESENTED

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

In this case, the First District Court of Appeal held that the Sixth Amendment's right to confrontation has no application to probation revocation hearings. The crux of its argument focused on whether such a proceeding was a "criminal prosecution" as that term is used in the Sixth Amendment.[1] If it is a criminal prosecution, as Peters argues, the United States Supreme Court's opinion in Crawford applies. If not, the defendant has only the Fourteenth Amendment's right to confrontation, a fact the First District never recognized.

In Crawford, the nation's high court overruled Ohio v. Roberts, 448 U.S. 56 (1980), which had allowed hearsay evidence deemed "reliable" to be admitted at trial as satisfying the Sixth Amendment's confrontation clause. After Crawford, however, hearsay which is considered testimonial can be admitted only if the declarant was unavailable and the defendant had had some opportunity to cross-examine him or her. Crawford, at 124 S. Ct. 1369, 1374.

[1] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him. . . "

> To be sure, the [Sixth Amendment] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence. . . , but about how reliability can best be determined.

Crawford at 124 S. Ct. 1370.

I. Morrissey v. Brewer and Gagnon v. Scarpelli.

In Peters, the First District relied heavily on decisions from federal appellate courts that have uniformly held that Crawford has no relevance to probation revocation hearings because such are not "criminal prosecutions" as required by the explicit language of the Sixth Amendment. Peters, at 627.[2] The court, in particular quoted extensively from State v. Abd-Rahmaan, 154 Wash. 2d 280, 111 P. 3d 1157 (2005), which in turn, relied on two decisions from the United States Supreme Court, Morrisey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973) to support its holding that a defendant has no Sixth Amendment right to confront his accusers in probation revocation hearings.[3] Morrisey and Gagnon, however, are Fourteenth Amendment Due Process cases, and

[2] The Fifth District, also relying on federal decisions, reached a similar result. Russell v. State, 920 so. 2d 683 (Fla. 5th DCA 2006).

[3] The federal and state courts that have considered this issue have similarly relied on Morrissey and Gagnon,

besides that crucial distinction, they present facts so distinct from the situation a probationer in Florida faces that their holdings mislead rather than direct the analysis the First District engaged in.

In Morrissey the nation's high court rejected the argument that prison parolees had no due process rights in their continued freedom. Instead, it held that as a minimum they were entitled to:

> (a)written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; 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.

Id. at 488-489.

In Gagnon, the court extended Morrissey to probation revocation hearings, the sort of proceeding involved in this case. Moreover, it rejected the contention that the probationer needed counsel because it would convert an informal "predictive and discretionary" inquiry into one "more akin to

that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee." Gagnon, at 787-88.

Thus, in both Morrissey and Gagnon, the court recognized that although the defendant had significant due process rights, the proceedings, nevertheless, were informal and "quasi-judicial." Id at 788.

II. The nature of probation revocation hearings in Florida.

Probation revocation hearings in Florida, on the other hand, present an entirely different picture. Instead of the casual, informal and nonadversarial hearing envisioned in those cases, probation revocation hearings in this State are judicial, adversarial inquiries that more closely resemble a Sixth Amendment trial. Those prosecutions differ significantly from the ones held in the federal or other state systems in the following ways:

1. A judge with all the trappings that office carries presides over the

hearing. In Gagnon the official apparently was a panel of hearing officers "familiar with the problems and practice of probation or parole." Id. at 789.

2. While courts in this State have characterized revocation hearings as "informal," Padalla v. State, 895 So. 2d 1251 (Fla.

2nd DCA 2005), that casualness applies generally only to the hearsay rule. In all other respects, the rules of evidence apply, and such hearings are fundamentally adversarial proceedings in which the judge remains neutral and detached even though it has the right, as it would at a trial, to clear up ambiguities. In either case, trial or revocation hearing, they have no authority to supply essential elements in the state's case. McFadden v. State, 732 So. 2d 1180, 1185 (Fla. 4th DCA 1999) .

3. The State is represented, not by a probation officer with rehabilitation in mind, Gagnon, but by a prosecutor from the State Attorney's office, who is, of course, a lawyer.

4. Likewise, even though Gagnon rejected the need for counsel in every case, this Court has said that defendants facing revocation of their probation, have a right to counsel. State v. Hicks, 478 So. 2d 22, 23 (Fla.1985). ("[U]unless there has been an informed waiver [of the right to counsel, a probationer] is entitled to counsel, and it must be afforded him before he is required to respond in any manner to the revocation charges.")

5. The prosecutor has the burden of proving the probationer violated one or more of the terms of his or her probation

6. The probationer is entitled to discovery to the same extent as if charged with an offense. He or she can also take depositions of witnesses disclosed by the State. Cuciak v. State, 410 So. 2d 916 (1982) ("Fair play and justice require that a defendant in a probation revocation hearing be entitled to reasonable discovery pursuant to Rule 3.220.")

7. At the revocation hearing, both parties can call witnesses who are sworn and subject to a perjury prosecution if they lie. The hearing affords the defendant an opportunity to be "fully heard," and to challenge the "charges" made against him. Rule 3.790(b), Fla. R. Crim. P.[4]

8. Testimony presented at the hearing typically is recorded.

9. The Fourth Amendment's exclusionary rule applies in probation revocation hearings. State v. Scarlet, 800 So. 220 (Fla. 2001).[5] Similarly, confessions given without any or inadequate Miranda warnings are inadmissible at revocation

[4] Rule 3.790 governs the procedure used in probation and community control revocation proceedings, another indication of the formality and seriousness that Florida gives to such hearings.

[5] That holding conflicts with those in similar cases from other states and federal appellate courts. Hudson v. State, 887 So. 2d 365 (Fla. 4th DCA 2004)(Gross, concurring)

proceedings. Hudson v. State, 887 So. 2d 365 (Fla. 4th DCA 2004).

10. A court cannot sentence the defendant until it has found he or she guilty of the allegations. Rule 3.790(b), Fla. R. Crim. P.

11. Defendants have the right to appeal orders revoking or modifying his or her probation. Rule 9.140, Fla. R. App. P.

Thus, probation hearings look more like a Sixth Amendment prosecution than those distinctly more casual proceedings found in Morrissey and Gagnon. As a result, a probation revocation hearing, as it is conducted in Florida, is a criminal prosecution as contemplated by the Sixth Amendment, so the United State Supreme Court's decision in Crawford applies.

III. A probation revocation hearing is a deferred sentencing.

In its opinion, the First District characterized probation revocation proceedings as "post conviction," the implication being that the Sixth Amendment concerns only what happens at a defendant's trial and nothing after a jury has returned its verdict. Peters, at 626. Indeed, the federal courts appear to have so limited the scope of the Sixth Amendment to trials. "Parole revocation proceedings are not criminal trials." Ashe v. Reilly, 431 F3d 826, 829 (DC Cir 2005).

Criminal prosecutions, however, have a broader scope than simply guilt determinations. As used in its legal sense, they include sentencing as well, as the definition found in Black's Law Dictionary (Revised 4th edition) p. 448 shows:

> Criminal Prosecution: An action or proceeding instituted in a proper court on behalf of the public, for the purpose of securing the convictions and punishment of one accused of crime.

(Emphasis supplied.)

Similarly, the United States Supreme Court , when confronted with defining the scope of a "prosecution" gave that term a more comprehensive definition than that used the Peters court. In Bradley v. United States 410 U.S. 605 (1973), it was urged to define:

> "prosecution" in its everyday meaning and limit it to simply a proceeding in which guilt is determined. Thus, in ordinary usage, sentencing was not part of the prosecution, but occurs after the prosecution had concluded.

Id. at 608.

While the court acknowledged that that approach had "some force," it rejected it.

> Rather than using terms in there everyday sense, "[t]he law uses familiar legal expressions in their familiar legal sense. . . The term "prosecution" clearly imports a beginning and an end.. . . In Berman v. United States, 302 U.S. 211, 82 L.Ed., 204, 58 S. Ct. 164 (1937), this Court said, "Final judgment means

> sentence. The sentence is the judgment. . . ." In the legal sense, a prosecution terminates only when sentence is imposed.

Id. at 609. (Citations omitted. Emphasis added.)

This more encompassing view of what is a criminal prosecution makes sense because often the most adversarial action occurs at sentencings. In capital cases, for example, no one has ever contended that the prosecution ends with a jury verdict that the defendant has committed a capital murder. Far from it. In many of those trials, the contention and bitter fighting starts when the sentencing phase begins. And even though the rules of evidence may be relaxed, the defendant still must have a "fair opportunity to rebut any hearsay evidence." Section 921.141(1), Florida Statutes (2004).

Therefore, since sentencing is part of the criminal prosecution, the Sixth Amendment applies, and more specifically, a defendant has the right to confront witnesses against him that are presented at those hearings. Rodriquez v. State, 753 So. 2d 29, 43 (Fla. 2000); Way v. State, 760 So. 2d 903, 917 (Fla. 2000); Specht v. Patterson, 386 U.S. 605 (1967): Desue v. State, 908 So. 2d 1116, 1117 (Fla. 1st DCA 2005).

This Court, moreover, has held that probation is part of sentencing, and that a revocation hearing is simply a deferred part of that proceeding. Green v. State, 463 So. 2d 1139, 1140 (Fla. 1985):

> The purpose of the revocation hearing was to determine whether the terms of petitioner's probation for a prior offense had been violated. As we have stated previously, this process constitutes a deferred sentencing proceeding.

Green arose in terms of a double jeopardy question, but other courts have extended the deferred sentencing holding of that case to include other constitutional rights. Santeufemio v. State, 745 So. 2d 1002 (Fla. 2nd DCA 1999)(Because a revocation hearing is a deferred sentencing the defendant has a right to be present.); Tur v. State, 797 So. 2d 4, 6 (Fla. 3rd DCA 2001)(Since the court could not impose a jail sentence without appointing counsel, it could not later do so at the "deferred sentencing" for a probation violation.)

Indeed, Section 948.01(2), Florida Statutes (2004) provides a legislative justification for Green's deferred sentencing holding:

> Section 948.01 When court may place defendant on probation or into community control
>
> * * *
>
> (2) If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either

> adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and shall place the defendant upon probation.

(Emphasis supplied.)

Thus, because a probation revocation hearing is merely a "deferred sentencing" the Sixth Amendment rights given defendants at sentencing hearings apply, and confrontation is one of those fundamental rights. Hence, Crawford applies to probation revocation hearings.[6]

Yet, they are also more than simply sentencing hearings, which typically have reduced, though not eliminated, standards of admissibility of evidence. Revocation hearings are similar to trials in the crucial sense that the State has a burden it must carry. It can do so, as it did in this case, only by presenting evidence that probationers have violated one or more terms of their probation. Mere allegations are insufficient. Hence, because that evidence may be contested, they have the Sixth Amendment right to confront the witnesses the State has arrayed against them. Allowing the State to carry that load without giving the defendant any ability to challenge

[6] Peters also argues that because sentencing is a critical stage for which he has a Sixth Amendment right to counsel, Mempa v. Rhay, 389 U.S. 128, 134-35 (1967), that right is meaningless without the right to challenge the State's evidence. Cross-examination is the traditional way that is done.

it is unconstitutional. Indeed, Peters presents the pristine example of why the framers said a defendant must have the right to confront his accusers:

> The primary object of the [confrontation clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895); quoted with approval in California v. Green, 399 U.S. 149, 157-58 (1970).

"Ex parte affidavits" is exactly what the State used in this case to carry its burden of showing Peters violated his probation. That was wrong because he had no way to personally confront by means of cross examination the only evidence the State presented that he had violated his probation. As such, allowing the state to use it violated this defendant's Sixth Amendment right to confrontation.

IV. The Due process right to cross examination.

If, however, a revocation hearing falls outside the interests of the Sixth Amendment, a probationer, nonetheless, has at least the due process right to confront witnesses and evidence used against him or her. That is, the United States Constitution has two confrontation clauses. The Sixth Amendment's

clause, by its own language, applies only to criminal cases. The Fourteenth Amendment's Due Process clause also provides for confrontation as part of its procedural requirements that parties be given notice and a hearing when the State wants to deprive them of some life, liberty, or property interest. This clause has a broader reach than simply criminal cases, and it has been found to apply when some government body seeks, for example, to terminate a person's welfare checks. Goldberg v. Kelly, 397 U.S. 254 (1970). In Goldberg, New York City summarily revoked Kelly's welfare assistance by the simple expedient of sending him a letter notifying him of that fact, but giving him a right to protest that decision. The nation's high court rejected that procedure because he had at least a property right in the assistance, and because of that, the State had to afford him some minimal due process. That meant he had the right to a notice of the State's intent to revoke his assistance, and a pre-termination hearing. Significantly, these "bare minimum" rights also included the right to "confront and cross examine" the witnesses the State planned to use to prove its case.

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. . . We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots.. . .This Court has been zealous to protect these rights from erosion.. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative. . . actions were under scrutiny.

Goldberg, at 269-70, citing, Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

In cases involving other types of property or liberty interests that court and others have reiterated that the basic, bare minimum requirements of the Fourteenth Amendment's due process clause include the right of the citizen to "confront and cross-examine" the witnesses the State plans to use against him or her. Vitek v. Jones, 445 U.S. 480 (1980)(Involuntary transfer of prison inmate from prison to a mental hospital); City of Lakeland v. Bunch, 293 So. 2d 66 (Fla. 1974)(Eminent domain); Tookes v. City of Riviera Beach, 633 So. 2d 566 (Fla. 4th DCA 1994)(employment)

As mentioned earlier, those cases, including this one, that have refused to extend the Sixth Amendment right to confrontation to probation revocation prosecutions have done so relying on due process decisions of the United States Supreme Court. Morrissey, Gagnon. Yet, even Morrissey and Gagnon recognized that a defendant at a parole or probation revocation hearing has enough of a liberty interest to require some due process. Morrissey, cited above, at p. 482; Jenkins v. State, 803 So. 2d 783, 785 (Fla. 5th DCA 2001)("Jenkins is entitled to a due process hearing before he can be deprived of his liberty.")

How much due process he or she is entitled to is the question, and it is one the First District, as do all the other courts denying probationers any benefit of Crawford, have uniformly ignored considering or answering. Had they done so, they would have concluded that whether under a Sixth Amendment Crawford type analysis or one made under the Fourteenth Amendment's Due Process clause, the defendant has the right to cross examine the witnesses the State has presented against him or her. Ashe v. Reilly, 354 S Supp. 2d 1 (D.D.C. 2005), reversed 431 F.3 826 (2005).

Even under the flexible due process analysis, the presumption arises that the defendant has the right to cross-examine the witnesses against him. That fundamental right is limited only if the State can provide a considerable reason or "good cause" why the court should limit it. Id. at 489.[5] In Morrissey, the nation's high court provided only a single compelling justification, an articulated danger to the witness, for doing so. Until now, no court has ever said that a defendant's liberty interests, or property interests for that matter, were so slight that a court could completely deny him the fundamental right of cross-examination. Even where only a

[5] Good cause existed if "the informant would be subjected to risk of harm if his identity were disclosed."

property right is at stake, the affected party has the right to confront and cross-examine those who would take it away from him or her.

Yet, that is what happened in this case. The First District has simply said that Peters has no Sixth Amendment or even due process right to confront and cross examine the lab report, which was the only evidence the prosecution presented to show he had violated his probation. Indeed, it cavalierly suggested that if he wanted to challenge the State's case against him he had the burden to produce the witnesses to do that.[7] Thus, what should have been an adversarial hearing was reduced to something less than even the informal administrative proceeding contemplated by Morrissey and Gagnon. After Peters, the State in probation hearings need only staple the lab report to the probation officer's affidavit and then set a date for sentencing. If he wants to challenge it, he has to produce the evidence rebutting the State's piece of paper. Without any fundamental right to

[7] The court also justified its holding by citing the "great expense" the State would incur in "most cases" if the defendant was allowed to cross examine the experts who had prepared the report that justified revoking his probation. Yet, in light of the great expense the state routinely incurs in revocation hearings, the additional cost of producing a single witness is so small as to be almost de minimus. That is, in Florida, such proceedings always involve a judge, prosecutor, defense lawyer, court reporter, bailiff, and others. It also involves the costs of discovery, which can include depositions (with a court reporter present), and occasionally, appeals with its attendant expenses. In truth, the "great expense" the First District worries about is really a "great expense" to the defendant who must bear the financial and legal burden of challenging the State's evidence.

challenge the State's case, either under a Sixth Amendment or Due Process right to confrontation, that is what probation hearings after Peters have become. This Court should reject that result because, under a due process analysis, Peters faces such a severe denial of his liberty interest to be free of prison, that his right to cross-examination should match that granted by the Sixth Amendment's confrontation clause.

And that is an expected result because Peters should have the same rights to at least confront and cross-examine those who would put him behind bars as he would if he stood trial for committing a second-degree misdemeanor, for which he could receive a maximum sentence of 60 days. As such Crawford has relevance and persuasive, if not strictly precedential, significance in a due process analysis.

It does so, because like the Sixth Amendment's confrontation clause, the Fourteenth Amendment's Due Process Clause provides a procedure or process to ensure the jury hears reliable evidence: confrontation and cross-examination. Neither constitutional provision is concerned with the substantive reliability of the hearsay. Hence, as with the Sixth Amendment's guarantee, the Due Process Clause's promise does so by the same, specific procedure: confrontation and cross-examination. The United States Supreme Court, with greater consistency in this area than in the

criminal arena, has repeatedly held that at the minimum procedural due process includes the right to confront and cross-examine the witnesses the State has produced to justify denying him or her some life, liberty, or property right.

Thus, to the extent that the First District in Peters allows reports that meet the admissibility requirements of Section 90.803(6), Florida Statutes (2004) to be admitted unless the defendant can prove its unreliability, it unconstitutionally denies a defendant his due process right to cross-examine witnesses who have evidence against him.

More specifically, the court in this case should have excluded the laboratory report because it was hearsay, and the only evidence used to show he had violated his probation, and he had no opportunity to cross examine the persons who had prepared it. "Confronting the messenger does not meet the due process requirement; cross-examining the officer [who reported the hearsay] is insufficient." Jenkins v. State, 803 So. 2d 783, 786 (Fla. 5th DCA 2001); C.f., Crawford at 124 S. Ct. 1364 ("Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.")

Thus, the court erred in allowing the State to present only hearsay that Peters could not challenge by cross-examination, the traditional method and "most powerful engine ever devised" for parties to ferret out the truth.

It bears repeating that confrontation and cross-examination have always been one of the fundamental "touchstones" of procedural due process. Reliability has not. Although those rights may be limited when the respective property and liberty interests are minimal, no court has done what the one in this case did: completely eliminated a defendant's right to cross-examine the very evidence that put this defendant in prison. As such, the trial court in this case abused its discretion in letting the State prove its case exclusively through hearsay.

V. The Business Record exception to the hearsay rule.

Crawford is a Sixth Amendment decision, and the Supreme Court's approach, besides involving an historical analysis, closely examined the words of the confrontation clause. When it did so, it concluded that the clause's right to confront and cross-examine witnesses applied only to those who had testified. Thus, if the hearsay sought to be admitted was not "testimonial" States were free to create whatever rules they wanted to determine its admissibility:

> But there is scant evidence that exceptions were invoked to admit testimonial statements against the accused in a criminal case. Most of the hearsay exceptions covered statements that by their nature were not testimonial-for example, business records or statement in furtherance of a conspiracy.

Crawford at 124 S. Ct. 1367. (Emphasis in opinion.); See, Desue v. State, 908 So. 2d 1116, 1117-18 (Fla. 1st DCA 2005).

Notwithstanding this language, the "business record" admitted in this case, the only evidence the State used to prove Peters had violated his probation, was still inadmissible. And it was so, for two reasons: 1. It was not the type of business record the framers of the constitution would have considered a business record, and 2. it was prepared solely for litigation, which fact takes it out of the business record exception.

1. The business record exception at the time of the adoption of the Constitution. By 1680 and certainly by the early 1700s the law of England had accepted the rule against admitting hearsay evidence in civil and criminal trials. 3 Wigmore Evidence, 3rd ed. Section 1364. Courts would eventually allow a few limited exceptions to that universal exclusion of out of court statements, but they did so because they recognized the value of cross examination:

> For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience. . . . [I]t is beyond any doubt the greatest legal engine ever invented for the discovery of truth.

> However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience. . . . [C]ross examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure.

3 Wigmore, section 1367.

Thus, when the common law began to recognize exceptions to the hearsay rule, it did so reluctantly, it severely limited its use, and it imposed stringent rules for its admissibility. One of those exceptions involved admitting evidence of the "shop books" of tradesmen. Objections to admitting this hearsay quickly arose, however, in part because unscrupulous merchants abused exception by fabricating or creating evidence specifically favorable to their position at trial. So, by the early 17th century, the English Parliament enacted legislation limiting the admissibility business records. Over the course of the next two hundred years, however, courts broadened the exception until 1832 when it took its final form in England.

The American experience regarding the business records exception was more conservative, and courts on this side of the Atlantic Ocean imposed additional requirements that business records had to meet before they could be admitted as and exception to the hearsay rule. It was not until the 1800s, and well after the adoption of the Bill of Rights, that the

Americans adopted the British rule on admitting business records. McCormick, On Evidence, (Second edition) Section 305.

Thus, by the late 18th century, the business records contemplated as being admissible were those of "debts for goods sold or services rendered on an open account." Id. There is no evidence that reports involving any sort of scientific (as we use that term today) evidence were admissible.

America at the time of the adoption of the Bill of Rights was a much simpler country; one in which science was in its infancy, and the medical practices of the day favored keeping the humors in balance with leaches and blood letting. Not even Benjamin Franklin, probably the preeminent scientist in America at the time, could have ever dreamed, imagined, or speculated about the lab report used by the State in this case and what an analysis of Peter's blood would reveal. That report, or those in a similar genre, would never have been admitted as a business record for the simple reason that it would never have come from a "shop book."

2. The lab report was inadmissible as a business record because it was prepared for purposes of litigation.

If, however, the framers could have envisioned the laboratory report used to justify revoking Peter's probation in this case, the trial court should still have excluded it because it was prepared for litigation. The objection to the

admission of business records as an exception to the hearsay rule arose in part from the rule that "a man cannot make evidence for himself." 3 Wigmore, Section 1518. Indeed, that old objection has retained its logic into the 20th century.

In Palmer v. Hoffman, 318 U.S. 109 (1943), the engineer in charge of a train that was involved in an accident gave a statement shortly afterward to a company investigator. Before trial he died and one of the parties sought to have what he said admitted at trial as a business record exception to the hearsay rule. The trial court refused to do so, and the United States Supreme Court approved that ruling, holding:

> [The report] is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. . . . In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

Id. at 113-14.

Similarly, the lab report used in this case was prepared, not as some record of the laboratory's inventory, accounts, or sales, but as the product of what it did. It was produced specifically for litigation, and its

trustworthiness was inherently suspect. Ehrhardt, Florida Evidence, 2005 edition, section 803.6, f.n. 7. Or, in terms of Crawford, it was testimonial evidence for which Peters should have had the opportunity to cross examine the person who made it. With such unreliability patent, the court could not have admitted the report under the business records exception. Indeed, the First District and other appellate courts have found other similar reports inadmissible under Crawford's requirement that testimonial evidence must be subject to a defendant's cross-examination. Belvin v. State, 31 Fla. L. Weekly D744 (Fla. 4th DCA March 8, 2006)(Breathalyzer affidavits inadmissible); Shiver v. State, 900 So. 2d 615 (Fla. 1st DCA 2005)(same); Johnson v. State, 31 Fla. L. Weekly D125 (Fla. 2nd DCA December 30, 2005)("Thus, despite Crawford's suggestion that all business records are non-testimonial, we hold that an FDLE lab report prepared pursuant to police investigation and admitted to establish an element of a crime is testimonial hearsay even if it is admitted as a business record.")

Thus, because the laboratory report used to justify revoking Peter's probation was testimonial, the court should have excluded it. That it did not was error this Court has to correct.

CONCLUSION

Based on the arguments presented here, 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 its 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 Robert Wheeler, Assistant Attorney General, The Capitol, Tallahassee, FL 32399; and to Robert Peters, 3731 Collinsworth Road, Westville, FL 32464, on this _____ day of April, 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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IN THE SUPREME COURT OF FLORIDA

ROBERT SHELDON PETERS,

Petitioner,

v. CASE NO. SC06-341

STATE OF FLORIDA,

Respondent.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR WALTON COUNTY

INITIAL BRIEF OF PETITIONER

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