IN SUPREME COURT OF FLORIDA

ROBERT SHELDON PETERS,

Petitioner,

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

STATE OF FLORIDA,

Respondent.
_____/

REPLY 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.

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.

This case raises a more fundamental problem than whether Crawford v. Washington, 541 U.S. 36 (2004) applies to probation revocation hearings. The real question involves whether the adversarial system of justice has a place in Florida criminal justice system. That is what confrontation and cross-examination imply, and it is the basic issue surrounding and permeating the question certified by the First District.

It does so because the State's strongest argument focuses on the first words of the Sixth Amendment: "In all criminal prosecutions . . ." If a revocation hearing is something other than a criminal prosecution then the Sixth Amendment is irrelevant, and so is Crawford. On pages 7-17 of Peter's Initial Brief, Peters argued that that approach is wrong. It still is, but there is another fundamental reason justifying that contention.

A criminal prosecution means an adversarial prosecution. The plain meaning of that phrase means that. Surely, the framers understood that phrase to mean that, and America, by the time the States had accepted the

Bill of Rights, had clearly accepted that method of determining the truth. Adversarial process permeates the Sixth Amendment, not only as evidenced by the confrontation clause, but with the right to be informed of the charges laid against the accused, the right to the assistance of counsel, and the right to compulsory process. Those rights, indeed the adversarial system itself have significance, however, only if the defendant can contest the State's allegations. Without that basic, fundamental right to challenge the prosecutor's case, however much a waste of time and money it may appear to everyone but the defendant, the other rights promised by the Sixth Amendment amount to only a veneer of justice.

Thus, when the State in this case completely denied Peters that fundamental right, the right to confront and cross-examine those who had prepared the report that justified revoking his probation, it cast into doubt Florida's commitment to the time tested method of determining the truth-the adversarial process. Frankly, Peters wonders what the State is afraid of that it is so adamant in refusing to let him challenge the only evidence that sent him to prison. Perhaps, contrary to the State's speculative assertion on page 17 of its brief, Pharmchem did have an interest in the outcome of the test results. Perhaps they were biased. Perhaps the test results were not done using well-recognized scientific tests. Or, maybe they were, but those well

recognized scientific tests were themselves suspect. Whatever the reason for the State's position, one must wonder what the prosecution is trying to hide. Of course, maybe everything is fine, but without any ability to probe and test the Pharmchem report, however inconvenient and a waste of time it may prove to be, we will never know. And if there is one thing that is true, it is that what is not tested grows confident, then lazy, then corrupt. Only the champions of the adversarial process, confrontation and cross-examination, keep the system honest. And if that proves inefficient and a waste of time and money most of the time, it is an expense this Court, until now, has been willing to incur to maintain the integrity of our adversarial system of justice.

Thus, the First District completely misses the point of the Sixth Amendment, and is at best naïve and myopic when it says that "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." Peters, at p. 628. Under that rationale, why have a trial at all because the State "in most cases" correctly charges a defendant. Why give him or her lawyer because "in most cases" the defendant is guilty? Why give him or her any confrontation because "in most cases" it does nothing to weaken the States case?

We give defendants fair trials, lawyers, and above all, the right to confront and cross-examine, in all criminal prosecutions because they keep the system honest and strong and immune from attacks of corruption, incompetence, and laziness. We do not do this on a case by case basis, but for every defendant in every case. And we do this simply because we cannot know where the water of corruption, incompetence, or laziness will spring in the dam of justice. So, constant, unrelenting vigilance is required even when there is no apparent threat, and the State is put to "great expense."

On page 7 of its brief, the State says "The overwhelming majority of federal courts which have considered the issue have agreed [that Crawford does not apply to probation revocation hearings.]" Well, so what? This Court has no obligation to follow what lower federal courts have said. Witt v. Wainwright, 387 So. 2d 922 (Fla. 1980). Indeed, with some regularity, it has even refused to follow misguided decisions of the United States Supreme Court. State v. Hicks, 478 So. 2d 22, 23 (Fla. 1985)(right counsel at probation revocation hearings); Traylor v. State, 596 So. 2d 957 (Fla. 1992)(confessions); Busby v. State, 894 So. 2d 88 (Fla. 2004)(exhausting peremptory challenges, requesting more, and saying on whom they would be exercised is all that is needed to preserve a claim of a biased jury); Griffis v. State, 759 So. 668, 672 2d (Fla. 2000)(right to appeal). So, that the

overwhelming majority of federal courts refuses to apply Crawford to probation revocation hearings is perhaps interesting but ultimately only that.

And it remains so because whatever procedures the federal system has devised to revoke a probationer's or parolee's freedom, it most likely is less judicial than that used in this State. Revocation hearings, except for hearsay and a jury, have all the trappings of a criminal prosecution, and as such they are clearly adversarial proceedings.

Similarly, if a "plethora of cases from the majority of federal circuit courts have held that the Confrontation Clause does not apply to sentencing procedures" (Appellee's brief at pages 10-11), that assertion ignores three critical facts: 1. The cases cited were decided long before Crawford, 2. they are federal, not Florida decisions, and 3. This Court has said that a defendant has a right to confrontation and cross-examination at sentencings.

> The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution. Pointer v. Tex*as,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. Pointer v. Texas. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) .
> *Id*. at 813-14; accord Gardner v. State, 480 So.2d 91 (Fla.1985) (finding error where trial court allowed jury to hear accomplice's statements incriminating defendant).

> Donaldson v. State, 722 So.2d 177, 186 (Fla.,1998)(Emphasis added.) Accord, Sutton v. State, Case No. 4D05-527 (Fla. 4th DCA May 10, 2006)(enhancing Sutton's sentence based solely on hearsay was error.); Smith v. State, 461 So. 2d 997 (Fla. 5th DCA 1984)

The State, on pages 12 and 13 of its brief, again relies on a federal court decision, United States v. Bell, 785 F.2d 640 (8th Cir. 1986), that created 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." First, the defendant does not have a "limited right to confront and cross-examine witnesses." To the contrary, Morrissey clearly indicated defendants at parole revocation hearings have a "full" right to do so, and only if the State provided "good cause" could the hearing officer limit this otherwise unfettered right. Thus, there is no test, balancing or otherwise, this Court need adopt, fashion, or otherwise create. Instead, courts need only ask if the State has produced "good cause" to limit a defendant's fundamental right to test the strength and existence of the State's case. And, in Morrissey, the nation's high court found only that a danger to a witness presented a strong enough reason to defeat or limit that fundamental right. Hence, courts should find "good cause" rarely, and only under the most dire circumstances. In short, the United States Supreme Court has affirmed what Peters contends: that he should have an unfettered right to confront the evidence intended to put him in prison.

The State, on pages 13 and 14 of its brief argues that the PharmChem lab report was not testimonial as that term was intended under Crawford. One must wonder why that evidence was created if not in anticipation of some future trial? Phamchem tests and analyzes samples submitted by criminal justice agencies. Law enforcement does this to help them determine a person's guilt or innocence. They know this, and Pharmchem, including its technicians, must know this as well. For the State to say that Pharmchem's agents did their work with the "only expectation the lab or the technicians was to be paid for the work performed" is utterly beyond belief. Under that way of thinking, a police report would not be testimonial because the police officers enforce the law only because they expect to be paid, and not in their wildest dreams do they ever have any idea that maybe, just maybe, someone might want them to testify at a trial or probation revocation hearing about what they wrote. That is nonsense, and so is the State's claim that the person who wrote the pharmchem report in this case did so without any notion that maybe someone might want to question what he did and how he did it.

Finally, on pages 17 and 18 of its brief, the State relies on the First District's public policy argument:

> Finally, 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* § 90.803(6)(a), Fla. Stat.
>
> Peters v. State, 919 So.2d 624 (2006), 627 -628 (Fla. 1st DCA 2006)

This public policy argument emphasizes more than just the cost of the adversarial process. It stresses the wasted time, money, and effort created by confrontation because in "most cases the defendant would suffer no prejudice from the admission of the written report." Using this justification for ignoring the constitution, the First District would have denied Clarence Earl Gideon, a broken down bum from Panama City, the right to a lawyer. After all, a jury had found him guilty of burglary, and the evidence clearly established that. But, the system has costs, and sometimes they are expensive ones, particularly when everyone knows the defendant is guilty. But tell that to Gideon because once he had a competent lawyer, a jury

acquitted him. Anthony Lewis, "Gideon's Trumpet," Random House (1964). Without a judicial crystal ball that sorts out the frivolous from the meritorious, the guilty from the innocent, confrontation and cross-examination remain the only method the framers of the constitution accepted for ferreting out the truth. To completely deny Peters his fundamental right to challenge the State's case against him because it puts the State to "great expense," insults those values the framers wrote into the Constitution, and holds the adversarial system in contempt.

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 his probation or conduct another revocation hearing consistent with this Court's 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 May, 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,

NANCY DANIELS
PUBLIC DENFENDER
SECOND JUDICIAL CIRCUIT

_____
DAVID A. DAVIS #0271543
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
301 S. MONROE STR., SUITE 401
TALLAHASSEE, FL 32301

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PETITIONER'S REPLY BRIEF

NACY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 0271543
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
SUITE 401
TALLAHASSEE, FL 32301
(850) 606-8517
ATTORNEY FOR APPELLANT

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