IN THE SUPREME COURT OF FLORIDA

ROBERT SHELDON PETERS,

Petitioner,

Case No. SC06-341

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S SUPPLEMENTAL ANSWER BRIEF

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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 re-adopts the statement of the case and facts as set forth in its original Answer Brief.

In addition thereto, it notes that during oral argument before this Court on September 19, 2006, Chief Justice Lewis provided the appellant with the opportunity to submit supplemental briefing “with regard to the applicability of the

6th Amendment to this proceeding." Although appellant declined the opportunity to provide supplemental briefing in open court, he has nonetheless, provided same.

SUMMARY OF ARGUMENT

The Sixth Amendment of the United States Constitution is strictly limited to "criminal prosecutions" and revocation has historically been recognized as not being part of a criminal prosecution. This holding was deemed applicable to Florida revocation proceedings. Bernhardt v. State, 288 So. 2d 490, 495-496 (Fla. 1974). Nothing in Crawford v. Washington,541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which reviewed a criminal trial, purported to alter the standards set by Morrisey/Scarpelli or otherwise suggested that the Confrontation Clause principle enunciated in Crawford is applicable to probation revocation proceedings.

Appellant's assertion that the principles enunciated in those cases should fail because in Florida a defendant is not actually sentenced prior to imposition of probation must fail, since imposition of supervised release is in effect a suspended sentence.

At the revocation hearing and at argument, appellant conceded that the lab report qualified as business record. Crawford specifically exempted business records from its definition of testimonial statements and the United States Supreme Court has held that laboratory reports constitute business records.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN REVOKING PETITIONER'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)

Standard of Review

"On appeal of a probation revocation, the question is whether the lower court has abused its discretion. Proof sufficient to support a criminal conviction is not required to support a judge's discretionary order revoking probation. Manning v. United States, supra; Brill v. State, supra. This Court has held that a formal conviction of a crime is not essential to enable the judge to revoke an order of probation. Brill v. State, 32 So. 2d 607 (Fla. 1947); See also Borges v. State, 249 So. 2d 513 (Fla. 1971)... On the basis of such determination he is authorized to exercise the discretion which we have mentioned in deciding whether the violation justifies a revocation of probation." Bernhardt v. State, 288 So. 2d 490, 501 (Fla. 1974)

Preservation

The State re-adopts its argument on preservation as set forth in its Answer Brief and again asks this Court to examine appellant's objection at the revocation hearing, which was limited to counsel asserting that admission of the PharmChem laboratory report was not corroborated by a presumptive test and stating, "I believe that it violates Mr. Peters' confrontation clause right. I have provided Crawford v. Washington, a U.S. Supreme Court case..." (II, 5-6). Thus, appellant at the time of the hearing was presenting what was strictly a challenge to admission of the report based upon the 6th Amendment to the United States Constitution. Any argument that his 6th Amendment Rights applies under Florida law because revocation is akin to sentencing was not preserved. Similarly, appellant, as conceded at oral argument, waived any objection to admission of the lab report as a business record.

Merits

1) The 6th Amendment pre-Crawford has been held not to apply to revocation proceedings.

The Sixth Amendment of the United States Constitution is strictly limited to "criminal prosecutions" and revocation has historically been recognized as not being part of a criminal prosecution.

In Morrisey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L. Ed.2d 484 (1972), the United States Supreme Court held that: 1) parole revocation proceedings do not afford a defendant the full panoply of right due to a defendant in a criminal proceeding, 2) a defendant in a parole revocation proceedings is entitled to due process rights which include a reasonably prompt informal inquiry conducted by an impartial hearing officer to determine if there are reasonable grounds to believe that the defendant has violated the terms of his parole, and 3) a hearing in which the defendant is afforded notice, disclosure of evidence, an opportunity to be heard and to establish, if possible, that he did not violate the terms, or that if he did so, mitigation exists which justifies continued parole, and a written statement as to the evidence relied upon and the reasons for revoking parole.

Significantly, in finding that a parolee faced with revocation did not have all of the constitutional rights afforded a defendant in the course of a criminal prosecution, but instead was entitled to due process, the Morrisey Court based its analysis on

> the proposition that **the revocation of parole is not part of a criminal prosecution** and thus the full panoply of right due a defendant in such a proceeding does not apply to parole revocations... Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the

> conditional liberty properly dependent on observance of special parole restrictions." 408 U.S. at 480 (internal citation omitted, emphasis added.)

Subsequently, in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), the United States Supreme Court recognized its prior holding in Morrisey that "even though the revocation of parole is not part of the criminal prosecution, ...the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process." 411 U.S. at 781. The Court extended applicability of Morrisey to probation revocation proceedings, holding that "[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution..." 411 U.S. at 782.

This holding was deemed applicable to Florida revocation proceedings. In Bernhardt v. State, 288 So. 2d 490, 495-496 (Fla. 1974), Bernhardt pled guilty to possession of LSD and was immediately placed on three years probation. He then was arrested for violation of the terms of that probation and his probation was temporarily revoked pending hearing. Following hearing, his probation was permanently revoked. On appeal, this Court addressed challenges the propriety of an order revoking Bernhardt's probation and held:

In addition to his discretion to grant probation, the trial judge has certain broad discretionary power to revoke probation. Bronson v. State, 148 Fla. 188, 3 So.2d 873 (Fla. 1941); Brill v. State, supra; State v. Cochran, supra; Manning v. United States, 161 F.2d 827 (5 Cir. 1947); Martin v. State, 243 So.2d 189 (Fla. App. 1971).

However, this discretionary power must be exercised in accordance with certain due process requirements. We must point out that long before the Supreme Court of the United States rendered its decisions in Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) and Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), this Court recognized due process required that a hearing must be accorded to the person charged before probation could be revoked and the evidence upon which to predicate a revocation introduced at the hearing must be sufficient to satisfy the conscience of the court that a condition of probation has been violated. Brill v. State, supra; Roberts v. State, 154 So.2d 695 (Fla. 1963); Martin v. State, supra.

In accordance with the philosophy pronounced by the Supreme Court in Morrissey v. Brewer, supra, and Gagnon v. Scarpelli, supra, this Court very early announced, the following:

> The major concern of the court at the hearing was whether or not appellant had been on good behavior during his suspended sentence. The liberty he was enjoying was by judicial grace, he had already plead guilty to the offense of selling moonshine liquor. The hearing is in no sense a retrial of the main offense. Having plead guilty to that, he is now subject to be sentenced as he might have been at the time the suspended sentence was promulgated if he has not observed its conditions. The hearing was to determine this and no more.
>
> Such hearings are informal and do not take the course of a regular trial, neither does the evidence have the same objective as that taken at a regular trial. Its purpose is to satisfy the conscience of the court as to whether the conditions of the suspended sentence have been violated. A secondary purpose is to give the person accused of violating the suspended sentence a chance to explain away the accusation against him, but even this does not contemplate a strict or formal trial. [cases cited]
>
> After all is said, the sixty-four dollar question with which we are confronted is whether or not the lower court abused his discretion in supplanting the suspended sentence with one to serve six months in the county jail.

> It is not a question of formal procedure with respect to notice, charges against the appellant, or examination of the evidence in support of the charges. Burns v. United States, supra. The Courts all hold that whether the action involves a suspended sentence, pardon or parole, due process requires that a hearing be accorded the one charged. U.S.C.A.Const. Amend. 14. In the case at bar, this requirement was met when the appellant was brought before the court for examination. He was no less a person convicted of law violation, and the suspension of his sentence was within the control of the court.
>
> But appellant insists that the evidence upon which his suspended sentence was revoked, was unlawfully secured and should not have been considered. Appellant confuses this hearing with the main trial at which he plead guilty. As already pointed out, we are now concerned with the question of whether or not the trial court abused his discretion in revoking the suspended sentence. This question is resolved not by evidence of guilt, but by evidence as to good behavior during the period of his suspended sentence." Brill v. State, supra, at 684-685, 32 So.2d at 608.

Thus, this Court has traditionally held[1] that "[p]robation revocation proceedings must comply with minimal requirements of due process," Hines v. State, 358 So. 2d 183 (Fla. 1978), regardless of the manner in which a defendant was placed on probation.

2) Crawford did not hold that the 6th Amendment Right to Confrontation applied to probation revocation proceedings.

[1] Appellant concedes that he has been unable to find any cases which held, prior to Crawford, that the Sixth Amendment applies in probation revocation proceedings. See Supplemental Initial Brief, page 2.

The holding in Crawford was strictly limited to criminal prosecutions and nothing in the opinion either directly or implicitly indicated that it applied to probation revocation proceedings or overruled the Morrisey and Scarpelli line of cases. See: United States v. Aspinall, 389 F.3d 332, 342-43 (2d Cir. 2004), abrogated on other grounds, United States v. Fleming, 397 F.3d 95 (2d Cir. 2005) holding "Nothing in Crawford which reviewed a criminal trial, purported to alter the standards set by Morrisey/Scarpelli or otherwise suggested that the Confrontation Clause principle enunciated in Crawford is applicable to probation revocation proceedings." 389 F.3d at 343. Numerous federal cases have agreed, including : United States v. Rondeau, 430 F.3d 44, 47-48 (1st Cir. 2005); United States v. Hall, 419 F.3d 980, 985-86 (9th Cir. 2005), cert. denied, 126 S. Ct. 838 (2005); United States v. Kirby, 418 F.3d 621, 627 (6th Cir. 2005); United States v. Martin, 382 F.3d 840, 844 n.4 (8th Cir. 2004); United States v. Wooden, 179 Fed. Appx. 601, 603 (11th Cir. 2006); United States v. Barazza, 318 F. Supp. 2d 1031, 1035 (S.D. Cal. 2004); Young v. United States, 863 A.2d 804, 808 (D.C. 2004); Ash v. Reilly, 431 F.3d 826, 829-30 (D.C. Cir. 2005). Numerous State Cases have also held Crawford does not apply in probation revocation proceedings, including: People v. Johnson, 121 Cal. App. 4th 1409, 18 Cal.

Rptr. 230, (Ca. 1st DCA 2004); People v. Turley, 109 P.3d 1025, 1026 (Colo. Ct. App. 2004); Jenkins v. State, 2004 Del. LEXIS 549 (Del. 2004); State v. Abd-Rahmann, 111 P.3d 1157 (Wash. 2005); Commonwealth v. Wilcox, 446 Mass. 61, 841 N.E.2d 1240, 1247-48 (Mass. 2006); State v. Rose, 2006 Ida. App. LEXIS 54, (Ct. App. 2006); People v. Brown, 2006 NY Slip Op 6706 (N.Y. App. Div. 2006); State v. Campbell, 2006 ND 168, P11 (N.D. 2006); Smart v. State, 153 S.W.3d 118, 121 (Tex. App. 2004). Florida cases so holding include: Sproule v. State, 927 So. 2d 46 (Fla. 4th DCA 2006) and Russell v. State, 920 So. 2d 683 (Fla. 5th DCA 2006). Appellant concedes at page 2 of his supplemental initial brief that Crawford mandates a close reading of the Sixth Amendment and he has failed to cite to one case which stands for the proposition that Crawford mandates application of the 6th Amendment to probation revocation proceedings.

3) Revocation Proceedings are not the functional equivalent of sentencing.

Appellant relies upon a footnote in Gagnon v. Scarpelli for the proposition that revocation in Florida does not fall within the purview of that case because here sentence has not been imposed previously. Id. at 411 fn. 3. This argument ignores the fact that in legal writing footnotes are recognized to contain information felt unworthy of placement in the body of a document

and it constitutes dicta which does not establish legally binding precedent. Ex parte Amos, 93 Fla. 5, 112 So. 289 (1927); State v. Florida State Imp. Com'n, 60 So. 2d 747 (Fla. 1952).

Appellant's argument ignores the primary point repeatedly made in Scarpelli, namely that "Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty." 411 U.S. at 782, 93 S. Ct. at 1759-60, 36 L. Ed. 2d at 661-62. It is sufficient that we deal here, not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime." 411 U.S. at 789, 93 S. Ct. at 1763, 36 L. Ed. 2d at 666.

Appellant elevates to unnecessary proportion the fact that in Gagnon the probationer had been sentenced to fifteen years for armed robbery, but the sentence had been "suspended" and probation imposed for seven years in its place whereas in Florida, a defendant placed on probation is not actually sentenced. The Gagnon Court was required to distinguish Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967), which had required counsel at sentencing of a probationer in a combined revocation and sentencing hearing because "counsel is required "at every state of a criminal proceeding where

substantial rights of a criminal accused may be affected," id., at 134, 88 S. Ct. at 257, and . . . sentencing is one such stage . . .” 411 U.S. at 781, 93 S. Ct. at 1759, 36 L. Ed. 2d at 661.

It was immaterial to the Supreme Court whether the sentencing came before a probation revocation hearing, during same or after. At sentencing, whenever it is held, counsel is required. The court expressly minimized the chronological order in which the sentencing and the probation violation hearing occurred, by going on to say in the next paragraph “Of greater relevance is our decision last Term in Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).” 411 U.S. at 781, 93 S. Ct. at 1759, 36 L. Ed. 2d at 661. The reference is to the holding that parole revocation is not a part of a criminal prosecution. Id.

Appellant’s argument is also weakened by virtue of the provisions of F.S. 948.06(1) which provide that following allegations of violation, “the court, as soon as may be practicable, shall give probationer an opportunity to be fully heard on his behalf in person and by counsel,” and that after such hearing the court may revoke, modify or continue the probation. As recognized by this Court in Caston v. State, 58 So. 2d 694, 697 (Fla. 1952), “[t]he above statute simply provides for an informal hearing whereby the trial court may

determine whether or not the conditions of the probation order have been violated.” The test is one of the sound exercise of judicial discretion, whether the probationer was accorded “fair treatment.” Brill v . State, 159 Fla. 682, 32 So. 2d 607 (1947). This is consistent with the minimal due process rights afforded by the statute: that the court "advise" the probationer of the violation charges, tell the probationer the potential consequences of a guilty plea, the right to counsel, and the right to a final hearing on violation of probation, at which time a probationer has the "opportunity to be fully heard on his or her behalf in person or by counsel."

Even the commentary to Fla. R. Crim. P. 3.790 notes that probation is akin to a suspended sentence. See also: Helton v. State, 106 So. 2d 7 (Fla. 1958), holding under F.S. 948.01, trial judges can suspend the imposition of sentence upon a convicted criminal, but such a sanction is accompanied with a mandate that the court shall place the defendant on probation under the supervision and control of the parole commission for the duration of such probation.

The State submits that appellant’s argument is thus not viable. Probation is not like sentencing and should not be considered as such, since it would leave in serious question such things as true split sentences, as Justice Bell pointed

out, or situations where imposition of a sentence is suspended and the defendant is placed on probation.

Finally, the State would note even if appellant were correct in asserting that he had a 6th Amendment right in this case, to prevail appellant would have had to claim and establish below that he was **prevented** from calling the individual who prepared the report. United States v. Adams, 2006 U.S. App. LEXIS 17291 (3d Cir. 2006); Ellis v. Phillips, 2005 U.S. Dist. LEXIS 13910 (S.D. N.Y. 2005). Here, appellant has never alleged, let alone proven, that he was denied the opportunity to call the lab worker. It is this type of action on the part of the government, i.e., action which effectively prevents a defendant from compelling the presence of a witness, which underlies the Amendment in the first place as shown by the historical examples discussed in Crawford. Appellant was not precluded in any fashion from calling the worker and most likely either deposed or spoke with him by phone prior to the hearing. Significantly, appellant never challenged the report in any manner and in fact conceded it was admissible as a business record. He simply failed to exercise his due process right to call the witness himself.

3) The laboratory report was not testimonial and was not prepared in anticipation of litigation.

The United States in Crawford held that the 6th Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 51. The phrase "testimonial statements," a critical portion of the holding, was not given absolute definition by the Court, which instead set forth "various formulations" of the core class of testimonial statements. These included affidavits, grand jury testimony and "statements taken by police officers in the course of interrogations." Id., at 53. Statements made in the court of police interrogations have been deemed testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Davis v. Washington, 2006 U.S. LEXIS 4886, 126 S.Ct. 2266, 165 L. Ed.2d 224 (2006).

Significantly, the Crawford Court exempted business records as firmly rooted exceptions to the hearsay rule. The Court has also held that the business record exception to the hearsay rule encompasses documents such as test results and medical diagnoses. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988).

Here, the test was performed by an independent laboratory which was not a "party" to the proceeding and which had no stake in its outcome. The lab's only 'expectation' was that it would be paid for its work in performing the test. Because the test is performed in the ordinary course of the lab's business, the lab had only the interest inherent in performing accurately to maintain its professional reputation.

Also of note is the fact that test is performed for the purpose of enabling a probationer to remain at liberty, by ensuring that he or she is complying with the terms of conditional release. Significantly, the majority of these tests come back with a negative result allowing the probationer to continue at liberty. It was not performed as part of an on-going police interrogation or investigation.

The lab worker does not associate a particular result with any person and will not remember independently any particular run or its result. He or she, if appearing in person, will rely on the contents of the report. The worker, at most, reports a non-discretionary result and the report is "simply a routine objective cataloguing of an unambiguous factual matter." United States v. Magyari, 2006 CAAF LEXIS 607, 10 (U.S. CA. A.F. 2006). It therefore is not a 'weaker substitute for live testimony at

trial,' it is the presentation of the same objective fact regardless of how it is introduced.

Numerous courts throughout the country have found that admission of similar documents which qualified as business records did not violate the principles set forth in Crawford. See: People v. Johnson, 121 Cal. App. 4th 1409, 18 Cal. Rptr. 3d 230, 233 (Cal. Ct. App. 2004) (laboratory report of substance determined to be cocaine used at probation revocation hearing "does not 'bear testimony,' or function as the equivalent of in-court testimony"); People v. Hinojos-Mendoza, No. 03CA0645, 2005 Colo. App. LEXIS 1206, *10 (Colo. Ct. App. July 28, 2005) (laboratory report establishing quantity and nature of cocaine was not testimonial due in part because the report was not prepared at the express direction of the prosecutor for the purpose of litigation); Commonwealth v. Verde, 444 Mass. 279, 827 N.E.2d 701, 705 (Mass. 2005) (certificates of analysis showing weight of cocaine not considered testimonial statements, as public records they constituted a recognized exception to Confrontation Clause); State v. Dedman, 2004 NMSC 37, 136 N.M. 561, 102 P.3d 628, 635-36 (N.M. 2004) (the unavailability of a nurse that drew blood from defendant did not render report documenting results as inadmissible because it was considered non-testimonial as the testing was generated by a Department of

Health employee, not law enforcement, and the report was not investigative or prosecutorial); State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 143 (N.C. 2006) (DNA results that were not prepared exclusively for trial were non-testimonial since "[t]hey do not fall into any of the categories that the Supreme Court defined as unquestionably testimonial"); State v. Huu The Cao, 626 S.E.2d 301, 305 (N.C. Ct. App. 2006) (holding "laboratory reports or notes of a laboratory technician prepared for use in a criminal prosecution are nontestimonial business records only when the testing is mechanical, as with the Breathalyzer test, and the information contained in the documents are objective facts not involving opinions or conclusions drawn by the analyst"); In re J.R.L.G., No. 11-05-00002-CV, 2006 Tex. App. LEXIS 3344, *6 (Tex. App. April 27, 2006) (urinalysis lab report from screening done under drug screen compliance check was non-testimonial evidence); State v. Carter, 2005 WL 767164 (Mont. 2005) (certification reports of breathalyzer admitted at trial did not violate 6th Amendment); Ellis v. Phillips, supra, (admission of DNA report at trial); United States v. Magyari, supra (Admission of random urinalysis at trial); State v. Przybobowski, 2004 Minn. App. LEXIS 835 (C.A. Minn 2004); State v. Sproule, 2006 Fla. App. LEXIS 4422 (Fla. 4th DCA 2006) (admission of driving record at trial).

Furthermore, the lab report in this case was admissible pursuant to F.S. 90.803(6) as a business record which complied with the provisions of F.S. 90.701-705 and F.S. 90.902(11). F.S. 803(6)(c) provides that the party seeking admission of the document must make it available to the opposing party “to provide...a fair opportunity to challenge the admissibility of the evidence.” Thus, the rule itself gave appellant the opportunity to challenge admission of the report prior to the revocation hearing. However, appellant failed to challenge the report and in fact conceded its admissibility as a business record. Appellant’s failure to file a motion objecting to admission of the report constitutes a “waiver of objection to the evidence.” F.S. 90.803(6)(c).

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal should be approved, and the order revoking appellant's community control 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, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401; 301 South Monroe Street; Tallahassee, Florida 32301, by MAIL on October _____, 2006.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

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

_____
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Attorney for State of Florida

IN THE SUPREME COURT OF FLORIDA

XXxXXX,

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APPENDIX

Xxxx, Florida Law Weekly,