

No. SC 86339

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IN THE SUPREME COURT OF MISSOURI

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STATE EX REL. PAUL E. HOOVER, Jr.,

Petitioner

Vs.

THE HONORABLE TED BOEHM,  
Sheriff of Boone County, Missouri,

Respondent

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WRIT OF HABEAS CORPUS REGARDING BOONE COUNTY CASE  
NO. 03CR170885-01

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BRIEF FOR PETITIONER

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Dated: November 05, 2004

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## **JURISDICTIONAL STATEMENT**

Missouri Supreme Court Rule 84.22 states that “no original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by appeal.” Because the incarceration in this case is based upon a probation revocation and there is no appeal from a probation revocation, there can be no appeal in this matter. The preclusion of an appeal leaves only this extraordinary remedy of this Writ from this Court.

Furthermore, Rule 83.23 speaks to this Court’s ability to issue original writs. This Rule specifically provides: “Original writs...may be issued by this court en banc, or by a judge in vacation.” Mo.R.Civ.Pro.84.23. This Rule gives this Court the power and the jurisdiction to hear this case.

Respondent in his Response to Order to Show Cause suggests that Petitioner did not exhaust remedies in the lower courts or demonstrate good cause why this petition is properly filed. Respondent concedes that Petitioner’s petition for a writ of habeas corpus was filed in the Western District of the Missouri Court of Appeals where it was denied on October 04, 2004. Respondent then asserts that Petitioner did not afford the circuit court of the county of incarceration an opportunity to correct the error and therefore did not exhaust the remedies as required by law before requesting relief before the appellate courts in this case.

Petitioner in his writ summary filed with this Court alleged that the Trial Court in the county of incarceration denied his Motion to Reconsider Finding of Probation Violation, described as a Motion to Set Aside on August 31, 2004. The Trial Court in the County of incarceration was provided by Petitioner with notice of the alleged error and then provided with the case law Petitioner believed controlling. That is a showing of good cause as to why another petition entitled petition for writ of habeas corpus would have been to no avail and need not be re-argued before the circuit court before seeking relief from the appellate courts through a petition for habeas corpus.

No higher court has been petitioned for relief in this matter by Petitioner. Petitioner declares that his due process rights and right to confrontation have been violated and that he is unlawfully restrained in the Boone County, Missouri Jail in the custody of Respondent, Sheriff Ted Boehm and that this Petition is in compliance with Rule 91 governing Writs of Habeas Corpus.

## STATEMENT OF FACTS

In this action, Petitioner Paul Hoover on March 17, 2004, plead guilty to Class A Misdemeanor of Unlawful Use of a Weapon and the Class A Misdemeanor of Domestic Assault 3<sup>rd</sup> for brandishing a weapon in the presence of his wife Kelly Hoover, he was sentenced to 40 days with credit for time served on Count I and 6 months in the Boone County Jail on Count II, execution of that sentence was suspended and he was placed on two years of supervised probation. (See A-4) A probation violation report was then filed with Court alleging that Petitioner had violated the terms of his probation by two new laws violations for violating an order of protection with regard to Kelly Hoover. (See A-9) On July 26, 2004, a probation violation hearing was held where Petitioner's Probation Officer testified over objections as to hearsay and right to confrontation that Kelly Hoover had told her that Petitioner had at least twice violated the order of protection issued against him. The State offered no explanation as to why Kelly Hoover did not testify or why she may have been unavailable to testify at the probation violation hearing. The Petitioner testified that he had not violated the Order of Protection and that any communication initiated by him was covered by the limited exception authorized by the issuing Court's order. The Court entered a finding that it was "*reasonably satisfied that Defendant*

*violated his probation as set forth in the Probation & Parole Report report dated 06/07/04, specifically, Condition #1 Laws by being twice arrested for violation for violation of an “Order of Protection – Adult” on 04/30/04”.*

(See A-5) The State did not introduce into evidence the order of protection or the information(s) charging Petitioner with these new law violations at this hearing. The Court was not requested to take judicial notice of the criminal information(s) or the order of protection and did not, sua sponte, take such notice. After entering the finding of violation the court continued the matter for disposition to another date. Petitioner filed a Motion to Reconsider Finding of Probation Violation, (See A-11-12) principally citing the violation of his due process and right to confrontation rights, and that motion was denied on August 31, 2004, when the court entered the following order and provided the following basis for the finding of violation, *“Based upon the testimony of Defendant’s Probation Officer (including said officer’s direct discussion with Defendant’s victim in which victim described Defendant’s conduct).”* (See A-6) On September 27, 2004, the Court ordered the sentence executed and the petitioner was incarcerated in the Boone County Jail. (See A-7) Petitioner had agreed to have the underlying charges tried together and on October 14, 2004, the State entered a Nolle Prosequi as

to one Count and preceded to trial on the remaining Count, a Boone County  
Jury returned a verdict of acquittal at the close of the case.

## POINTS RELIED ON

- I. Petitioner is entitled to the issuance of a Writ of Habeas Corpus ordering his release from incarceration at the Boone County Jail because of the denial of his right to confront the witness against him and the failure of the State to provide compelling justification for her absence from his probation violation hearing in violation of his Federal and State Constitutional rights to due process and confrontation, in that the trial court relied on the hearsay account of her testimony as the basis to find that he violated his probation by two new laws violations.

*Crawford v. Washington*, 124 S.Ct. 1354 (U.S. S.Ct, 2004)

*Mack v. Purkett*, 825 S.W. 2d 851 (Mo. Banc 1992)

*In Re Carson v. Pierce*, 789 S.W. 2d 495 (Mo. App S.D. 1990)

*U.S. v. Martin*, 382 F.3d 840 (8<sup>th</sup> Cir, 2004)

- II. Petitioner is entitled to the issuance of a Writ of Habeas Corpus ordering his release from incarceration at the Boone County Jail because of the denial of his right pursuant to RSMo. 559.036.4 to a finding by the trial court conducting the probation violation hearing as to “whether revocation is warranted under all the

circumstances” in that the trial court made no such finding when it ordered Petitioner’s incarceration.

Fifth Amendment, Constitution of the United States

Fourteenth Amendment, Constitution of the United States

Article I, Section 10, Constitution of State of Missouri

Revised Statutes of Missouri Section 559.036.4 (2000)

### **ARGUMENT**

- I. Petitioner is entitled to the issuance of a Writ of Habeas Corpus ordering his release from incarceration at the Boone County Jail because of the denial of his right to confront the witness against him and the failure of the State to provide compelling justification for her absence from his probation violation hearing in violation of his Federal and State Constitutional rights to due process and confrontation, in that the trial court relied on the hearsay account of her testimony as the basis to find that he violated his probation by two new laws violations.**

The State filed a motion of a probation violation by alleging that Petitioner violated his probation by committing 2 “Laws” violations, namely a violation of an order of protection, since being

placed upon probation. Defendant denied the violation(s) and the matter was set for a hearing on July 26, 2004. The State has the burden to produce admissible evidence to convince the court that Petitioner had violated the condition(s) cited in the violation notice submitted to the court.

Missouri Law is well settled that an arrest is no evidence that a criminal offense was committed. See also Missouri Approved Instructions-Criminal 3d (MAI-CR3d) 300.02.

The State presented the Defendant's Probation Officer Mary Ann Castille who testified that Petitioner denied violating the law and who, over objections as to hearsay and right to confrontation, testified that the Defendant's wife informed her that she believed Defendant had violated the orders of protection issued against Defendant. The State presented no other evidence that Defendant had violated the law as contained in the probation violation report before the Court. The State presented no reason or justification for its failure to call Kelly Hoover, the complaining witness in the underlying criminal charge(s) that provided the basis for the probation violation allegations.

Petitioner testified and specifically refuted the allegations that he had violated the orders of protection in the underlying criminal charge cited in the probation violation.

The Right to Confrontation applies in probation violation hearings. *In Re Carson v. Pierce*, 789 S.W. 2d 495 (Mo Ct. of App. S.D. 1990) held that in probation violation hearing that Petitioner had a right to confront and cross-examine an adverse witness. The Missouri Supreme Court in *Mack v. Purkett*, 825 S.W. 2d 851 (1992) cited *Carson* with approval and held in parole revocation hearing Petitioner had right to confront and cross-examine adverse witnesses.

The U.S. Supreme Court in *Crawford v. Washington* 124 S. Ct. 1354 (2004) held that “*admission of wife’s out of court statements to police officers, regarding incident in which defendant, her husband, allegedly stabbed victim violated Confrontation Clause.*” The clarification of the Right to Confrontation as expounded by the U.S. Supreme Court makes this case a matter of first impression for Missouri Courts in a post-*Crawford* context.

The Eighth Circuit of the United States Court of Appeals, after *Crawford*, in a case out of Missouri decided in *U.S. v. Martin*, 382 F.3d 840 (8<sup>th</sup> Cir. 2004) held that where the State had shown a patient was talking to her treating doctor that any such statements are held to have an inherent

reliability due to the treatment being provided contemporaneous with the statements and the State had shown that the witness that uttered the statements was justifiably unavailable and why confrontation was undesirable or impracticable and that reliability of the evidence which the government offered in the place of live testimony was well established then it meet the test of admissibility and overcame the probationer's limited right to confront and cross-examine a witness. In this case the State made no showing of the unavailability of the witness and the Statements by Kelly Hoover to Petitioner's Probation Officer have no special indicia of reliability similar to that of patient communicating with her treating doctor.

In another case decided in federal court after *Crawford*,

In the Southern District of California in *U.S. v. Barraza*, 318 F. 3d 1031, (S.C. Cal. 2004) it applies what appears to be the minority rule that in the federal revocation hearing, even a limited right to confrontation does not exist. This is contrary the Majority/Missouri Rule even in a probation violation or parole revocation hearing a limited right to confrontation does exist.

In this case the Petitioner has consistently challenged the assertion that he had committed any new laws violations once being placed upon probation and asserted that any communication was within the exceptions

authorized by the Court or was initiated by Kelly Hoover and he only identified it as her when answering her calls to his phone.

**II. Petitioner is entitled to the issuance of a Writ of Habeas Corpus ordering his release from incarceration at the Boone County Jail because of the denial of his right pursuant to RSMo. 559.036.4 to a finding by the trial court conducting the probation violation hearing as to “whether revocation is warranted under all the circumstances” in that the trial court made no such finding when it ordered Petitioner’s incarceration.**

The due process requirements established by the legislature in RSMo. 559.036.4 (2000) and by the Fifth and Fourteenth Amendments to the United States Constitution and Article 10 of the Missouri Constitution provide that when specific procedure requirements are mandated that the government must comply with those requirements before depriving a citizen of their liberty and failure to comply provides a basis to rescind the governments deprivation of an individual’s liberty.

### **CONCLUSION**

Respondent is unlawfully restraining Petitioner due to the

failure of the State to provide Petitioner his due process and limited right to confrontation as guaranteed by Federal and Missouri Constitutions. The State offered no justification as to why it could or should not call Kelly Hoover to the stand to testify to the allegations of law violations in Petitioner's probation violation hearing. In addition, Kelly Hoover's hearsay statement to Petitioner's Probation Officer had none of the indicia of reliability of a doctor relating his patient's statements that she had made to him, while he was treating her injuries. The post-Crawford analysis of hearsay and right to confrontation applies a much more stringent standard. Petitioner does not assert the Right to Confrontation required by Crawford in criminal trials is transferred intact to a probation violation hearing, but that the stringent test of a burden upon the State to show why confrontation should not occur and that any hearsay meets stringent standards of reliability, as in a doctor relating statements made by a patient during treatment or some similar rigorous standard be established before the limited but vital right to confrontation a citizen has in a probation revocation hearing may be abridged.

In this case the State made no showing of why Kelly Hoover

was unavailable or how her hearsay statements to the Probation Officer had any special indicia of reliability. The Trial Court's reliance on the hearsay statements of Kelly Hoover as communicated by Petitioner's Probation Officer as the basis of finding he violated his probation is in violation of his constitutional rights to due process and confrontation and therefore render his present incarceration unlawful.

Respectfully submitted,

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**CERTIFICATE OF COMPLAINE WITH RULE 84.06(b)**

The undersigned certifies that in accordance with Mo.R.Civ.P. 84.06(c), the foregoing appellate brief complies with the word count Limitations contained in Mo.R.Civ.P. 84.06(b). In particular, Petitioner's Brief contains 2812 words, based upon a word count generated by Microsoft Word XP, the word processing program used by Petitioner to compile the instant brief. Pursuant to Mo.R.Civ.P. 84.06(g), the attached disk has been scanned for viruses and is virus free.

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Stephen Wyse