IN THE
SUPREME COURT OF MISSOURI

STATE EX REL. SHARONDA TANKINS	)	
	)	
RELATOR,	)	
v.	)	**No. SC95370**
	)	
THE HONORABLE THOMAS FRAWLEY	)	
	)	
RESPONDENT.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI FROM
THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

RELATOR'S BRIEF

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JURISDICTIONAL STATEMENT

This is an original proceeding in mandamus pursuant to Missouri Supreme Court Rules 84.22 to 84.26, inclusively. On October 13, 2015, Sharonda Tankins filed a Petition for Writ of Mandamus requesting the Missouri Court of Appeals, Eastern District to prevent the Respondent, the Honorable Thomas Frawley, from revoking Ms. Tankins' probation and holding a sentencing hearing in her case. On October 15, 2015, the Missouri Court of Appeals, Eastern District, denied Ms. Tankins' Petition for Writ of Mandamus without opinion. On December 22, 2015, this Court issued its Preliminary Writ of Prohibition.

Jurisdiction over this matter lies in this Court under the Missouri Constitution, Article V, § 4(1), and the Missouri Supreme Court Rules 84.22 to 84.26 and 94.01 to 94.07.[1]

[1] Relator Sharonda Tankins ("Ms. Tankins") will cite to the record as follows: Exhibits, "(Ex.)"; Transcript of the Revocation Hearing, "(Tr.)"; and Court's Order Revoking Probation, "(Ord.)."; Respondent's Answer to Relator's Petition for Writ of Prohibition, "(Ans.)." All statutory references are to RSMo 2000 unless otherwise stated.

STATEMENT OF FACTS

The State charged Ms. Tankins with Fraudulent Use of a Credit Device (Value $500 or more), in violation of § 570.130, RSMo Cum. Supp. 2002. (Ex. 1-3). On December 4, 2012, Ms. Tankins pleaded guilty. (Ex. 1-3). The court suspended imposition of sentence and placed her on probation for four years. (Ex. 1-3). The court also ordered Ms. Tankins to pay $2,308.03 in restitution. (Ex. 1-3). The written judgment does not provide a schedule on which Ms. Tankins has to pay her restitution. (Ex. 1-3). The Restitution Memo filed on December 4, 2012, ordering Ms. Tankins to pay restitution, also does not set a schedule. (Ex. 4). Neither document included a deadline for the restitution. (Ex. 1-4).

On November 8, 2013, the court issued an order suspending Ms. Tankins' probation and issued a capias warrant for her. (Tr. 4). At some point after that, authorities detained Ms. Tankins and brought her before the court. (Tr. 4). Ms. Tankins was given notice of the alleged violations of the conditions of her probation. (Tr. 4).

On September 4, 2015, the court held a probation revocation hearing in Ms. Tankins' case. (Tr. 1-29). Assistant Circuit Attorney Chris Faerber represented the State. (Tr. 2). Assistant Public Defender Brian Horneyer represented Ms. Tankins. (Tr. 2).

The State called Lakesha Thomas to testify. (Tr. 4). Ms. Thomas was Ms. Tankins' probation officer. (Tr. 5). Before Ms. Thomas began testifying, Ms. Tankins objected on the grounds that Ms. Thomas was an incompetent witness because she had no personal knowledge of anything relevant to the hearing, and all of her testimony would

be hearsay derived from probation reports written by other people. (Tr. 4). The judge reserved ruling on the objections. (Tr. 4-5).

Ms. Thomas testified that she became Ms. Tankins' probation officer on August 19, 2015. (Tr. 5). This was almost two years after the court issued its order suspending Ms. Tankins' probation. (Tr. 4).

Ms. Thomas testified about the production of probation reports. (Tr. 7-8). The State gave Ms. Thomas a probation violation report dated October 17, 2013, almost two years before Ms. Thomas took over Ms. Tankins' case. (Tr. 9-10). The report had been prepared by a different district than the one at which Ms. Thomas worked. (Tr. 10). The State offered the report into evidence anyway. (Tr. 10). Ms. Tankins objected on multiple grounds: lack of foundation, hearsay, and lack of foundation for the business records exception to the hearsay rule. (Tr. 10). It was undisputed at the hearing that Ms. Thomas was not the custodian of records. (Tr. 1-29). Respondent does not now contend that she was. (Ans. 1-13). The court received the report as an exception to the hearsay rule. (Tr. 11).

The State then introduced reports from November 26, 2013 and June 5, 2015. (Tr. 11-12). Ms. Tankins objected on the same grounds. (Tr. 11-12). The court received the reports using the same reasoning. (Tr. 11-12).

According to the reports, Ms. Tankins violated her probation. (Tr. 13).[2] The reports alleged that Ms. Tankins:

1. Failed to enroll into an employment program twice (Tr. 13-14; 17);
2. Failed to provide documentation that she had enrolled in an employment program by July 9, 2013 twice (Tr. 15; 17);
3. Failed to make $70 per month payments towards restitution twice (Tr. 15; 17);
4. Tested positive for tetrahydrocannabinol (THC) in February 2013 (Tr. 16);
5. Failed to pay her monthly required $30 intervention fee (Tr. 16);
6. Was charged with petty larceny, though the case was dismissed (Tr. 17);
7. Tested positive for THC in June 2013 (Tr. 17); and
8. Failed to report to her probation officer once. (Tr. 17-18).

In addition to objecting to the admission of the reports in the first instance and a continuing objection to all testimony derived therefrom (Tr. 14), Ms. Tankins also objected to evidence of some of the specific violations. (Tr. 13-18). Ms. Tankins objected to testimony about the alleged drug violations based on lack of foundation and double hearsay grounds. (Tr. 15-16). Ms. Tankins argued that "any results relayed to this probation officer came first from a previous probation officer and second, from a drug

[2] Testimony about the contents of the reports and the reports themselves were the only source of evidence that Ms. Tankins had ever violated her probation. (Tr. 1-29). No witness with personal knowledge of any alleged probation violations testified as to those violations. (Tr. 1-29).

testing report." (Tr. 15). The court overruled the objection "as it's part of the business record maintained by Probation and Parole." (Tr. 16). Ms. Tankins objected again the second time on the same grounds. (Tr. 17). The court again overruled the objection. (Tr. 17). Neither the actual reports from the drug tests, nor any evidence about their administration, accuracy, or reliability was admitted. (Tr. 1-29).

Ms. Tankins objected to the laws violation because "it's multiple levels of hearsay from the victim to the police officer to the original probation officer to this probation officer, that's at least three to four levels of hearsay without an exception." (Tr. 16). The court overruled the objection. (Tr. 16).

Ms. Thomas then testified that her office's recommendation was to revoke Ms. Tankins' probation. (Tr. 18).

Ms. Thomas was not Ms. Tankins' probation officer during any of the alleged violations. (Tr. 19). She had no personal knowledge of the violations. (Tr. 19). She never observed the violations herself. (Tr. 19). Every bit of information she knew about the case came from the reports. (Tr. 19). Ms. Thomas did not observe Ms. Tankins use marijuana. (Tr. 20). The THC in Ms. Tankins' system that the tests registered could have been caused by Ms. Tankins' use of marijuana before the time her probationary period began. (Tr. 20-21).

Only about fifteen to twenty percent of Ms. Thomas' probationers are employed. (Tr. 21). It can be difficult to find a job when one is on probation. (Tr. 21). Sometimes it takes a long time for probationers to find a job. (Tr. 21). Ms. Thomas was unaware that Ms. Tankins had actually found a job at Kentucky Fried Chicken. (Tr. 21).

After Ms. Thomas finished testifying, the State called Ms. Tankins to the stand. (Tr. 22). The State asked her name, and she answered. (Tr. 22). The court asked her age, and she answered. (Tr. 22). Ms. Tankins objected that the State's calling her to the stand violated her "right against self-incrimination[.]" (Tr. 23). The court overruled the objection. (Tr. 24). The State then asked a series of questions, to which Ms. Tankins responded that she was "tak[ing] the Fifth Amendment." (Tr. 23-27). The questions were:

1. "Did you plead guilty on December 4th to the felony of fraudulent use […] fraudulent use of a credit device?"[3] (Tr. 23).
2. "During your time on probation did you make any restitution payments?" (Tr. 24).
3. "During your time on probation did you pay any fees at all?" (Tr. 24).
4. "During the time on probation did you provide what is referred to as a dirty urine analysis?" (Tr. 24-25).
5. "During your time on probation did you enroll in a structured employment program?" (Tr. 25).
6. "During your time on probation did you provide any job search logs at all?" (Tr. 25).
7. "During your time on probation were you arrested for a larceny?" (Tr. 26).
8. "And during your time on probation did you stop reporting, otherwise known as abscond?" (Tr. 26-27).

[3] Ms. Tankins' objection to the State calling her as a witness came after this question.

During this questioning, the court announced its intention to draw negative inferences from Ms. Tankins' assertion of her Fifth Amendment privilege against self-incrimination. (Tr. 26). Ms. Tankins objected. (Tr. 26).[4] After these questions, the State rested its case. (Tr. 27). Ms. Tankins did not put on evidence. (Tr. 27). The Court released Ms. Tankins on her personal recognizance pending sentencing. (Tr. 27-28).

On September 14, 2015, the court revoked Ms. Tankins' probation. (Ex. 35-37). In its order, the court acknowledged that Ms. Thomas "had no personal knowledge of Defendant's alleged violations of her probation." (Ex. 36). The court cited § 490.680 as its basis for allowing the reports into evidence over Ms. Tankins' hearsay objection. (Ex. 36). The court then summarized Ms. Thomas' testimony. (Ex. 36). The court determined that it was entitled to draw a negative inference from Ms. Tankins' assertion of her Fifth Amendment privilege against self-incrimination. (Ex. 36-37). The order contains no findings of fact about the alleged probation violations. (Ex. 35-37). The court did not specify which violations it specifically found to have occurred, or which it was relying on to revoke Ms. Tankins' probation. (Ex. 35-37).

On October 13, 2015, Sharonda Tankins filed a Petition for Writ of Mandamus requesting the Missouri Court of Appeals, Eastern District to prevent the Respondent, the Honorable Thomas Frawley, from revoking Ms. Tankins' probation and holding a

[4] While the court never formally ruled on the objection – its only response was "Fair enough." (Tr. 26). It is clear based on the entirety of the record that the objection was overruled. *See* (Tr. 26).

sentencing hearing in her case. On October 15, 2015, the Missouri Court of Appeals, Eastern District, denied Ms. Tankins' Petition for Writ of Mandamus without opinion. On December 22, 2015, this Court issued its Preliminary Writ of Prohibition.[5] This Court ordered Respondent to file a written return to the petition on or before January 21, 2016 to show cause why a writ of prohibition should not issue. Respondent filed his Answer/Return on January 21, 2016.

To avoid repetition, Ms. Tankins will state additional facts as necessary in the argument sections.

[5] Although Ms. Tankins originally asked for a Writ of Mandamus, "[i]t is within this Court's discretion to treat relator's petition for a writ of mandamus as one for a writ of prohibition." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994). "The distinction between mandamus and prohibition is at best blurred, at worst nonexistent, and the subject matter to which the two writs apply overlap to a great extent." *Saint Louis Little Rock Hospital, Inc. v. Gaertner*, 682 S.W.2d 146, 148 (Mo. App. E.D. 1984).

POINT I

The hearing court erred in admitting unreliable hearsay evidence over Ms. Tankins' objection and without a finding of good cause, in that the court allowed Ms. Thomas to testify as to the contents of probation reports that did not meet the criteria for any hearsay exception. Because no one who had personal knowledge of the events described in the reports testified, allowing this testimony violated Ms. Tankins right to confront adverse witnesses. This error prejudiced Ms. Tankins in that but for the admission of this inadmissible hearsay evidence, there is a reasonable probability that the outcome of the hearing would have been different and Ms. Tankins' probation would not have been revoked. By admitting this evidence, the court deprived Ms. Tankins of her rights to due process and confrontation in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

Crawford v. Washington, 541 U.S. 36 (2004);

Gagnon v. Scarpelli, 411 U.S. 778 (1973);

Morrissey v. Brewer, 408 U.S. 471 (1972);

State ex rel. Mack v. Purkett, 825 S.W.2d 851 (Mo. banc 1992);

Mo. Const., Art. I §§ 10 and 18(a);

U.S. Const., Amends. V, VI, and XIV; and

§ 490.680, RSMo.

POINT II

The hearing court erred by failing to make specific findings of fact about what conditions of her probation it found Ms. Tankins had violated and by failing to specify the factual basis for the revocation of Ms. Tankins' probation. But for this error, there is a reasonable probability that the outcome of the hearing would have been different. By failing to make specific factual findings and failing to specify the reason Ms. Tankins probation was revoked, the trial court deprived Ms. Tankins of her right to due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

Belk v. Purkett, 15 F.3d 803, 814 (8th Cir. 1994);

Ex parte Ryan v. Wyrick, 518 S.W.2d 89 (Mo. App. K.C.D. 1974);

Gagnon v. Scarpelli, 411 U.S. 778 (1973);

Morrissey v. Brewer, 408 U.S. 471 (1972);

Mo. Const. Art. I, §§ 10 and 18(a); and

U.S. Const., Amends. V and XIV.

POINT III

The hearing court erred in compelling Ms. Tankins to take the stand for no other purpose than so that she could invoke her Fifth Amendment privilege against self-incrimination and in drawing a negative inference from her having done so. But for Ms. Tankins' taking the stand and the negative inferences drawn therefrom, there is a reasonable probability that the outcome of the hearing would have been different and Ms. Tankins' probation would not have been revoked. By compelling her to take the stand and drawing negative inferences, the hearing court deprived Ms. Tankins of her right to due process of law and her privilege against self-incrimination in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 19 of the Missouri Constitution.

Baxter v. Palmigiano, 425 U.S. 308 (1976);

Gagnon v. Scarpelli, 411 U.S. 778 (1973);

In re Berg, 342 S.W.3d 374 (Mo. App. S.D. 2011);

Morrissey v. Brewer, 408 U.S. 471 (1972);

Mo. Const. Art. I, §§ 10 and 19;

U.S. Const., Amends. V and XIV;

564.084, RSMo;

570.030, RSMo; and

575.040, RSMo.

ARGUMENT I

The hearing court erred in admitting unreliable hearsay evidence over Ms. Tankins' objection and without a finding of good cause, in that the court allowed Ms. Thomas to testify as to the contents of probation reports that did not meet the criteria for any hearsay exception. Because no one who had personal knowledge of the events described in the reports testified, allowing this testimony violated Ms. Tankins right to confront adverse witnesses. This error prejudiced Ms. Tankins in that but for the admission of this inadmissible hearsay evidence, there is a reasonable probability that the outcome of the hearing would have been different and Ms. Tankins' probation would not have been revoked. By admitting this evidence, the court deprived Ms. Tankins of her rights to due process and confrontation in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

Standard of Review

"A writ of mandamus is the appropriate remedy for a party to enforce a right that is clearly established and presently existing." *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998). "By contrast, prohibition will lie only where necessary to prevent a usurpation of judicial power, to remedy an excess of jurisdiction, or to prevent an absolute irreparable harm to a party." *Id.* "Prohibition will lie when there is an important question of law decided erroneously that would otherwise escape review by this Court, and the aggrieved party may suffer considerable hardship and expense as a

consequence of the erroneous decision." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994).

"Mandamus is a discretionary writ that is appropriate where a court has exceeded its jurisdiction or authority and where there is no remedy through appeal." *State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158, 159 (Mo. banc 2007). "If the error is one of law, and reviewable on appeal, a writ of prohibition is not appropriate." *Mummert*, 887 S.W.2d at 577. "As there is no right to appeal a probation revocation order, […] validity of the probation revocation order […] can only be reviewed through an extraordinary writ." *State ex rel. Poucher v. Vincent*, 285 S.W.3d 62, 64 (Mo. banc 2008).

"This Court has the authority to issue and determine original remedial writs." *State ex rel. McKee v. Riley*, 240 S.W.3d 720, 725 (Mo. banc 2007). "Prohibition is an extraordinary remedy to prevent exercise of extrajurisdictional power and is not a writ of right." *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. banc 1999). "A writ of prohibition is appropriate in three scenarios: to prevent the trial court from usurping judicial power when it lacks the requisite jurisdiction, to remedy an excess of jurisdiction or abuse of discretion when the lower court lacks the power to act, and to prevent a party from suffering irreparable harm." *State ex rel. Brantingham v. Grate*, 205 S.W.3d 317, 319 (Mo. App. W.D. 2006).

The general rule is that no appeal lies from the dismissal or denial of a petition for a writ of mandamus. *See Harkins v. Mitchell*, 911 S.W.2d 689, 690 (Mo. App. E.D. 1995) (holding no appeal permitted from dismissal of writ of mandamus petition). The "remedy is a direct application for writ of mandamus to a higher court." *Id.*

Argument

1. Defendants at probation revocation hearings have a right to confront adverse witnesses absent a finding of good cause why they should not.

"In all criminal prosecutions, the accused shall enjoy the right […] to be confronted with the witnesses against him[.]" U.S. Const., Amend. VI; *see also* Mo. Const., Art. I § 18(a) ("That in criminal prosecutions the accused shall have the right to […] meet the witnesses against him face to face[.]").

"Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). "[A] probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer*[, 408 U.S. 471 (1972)]." *Id.* "We see, therefore, that the liberty of a parolee,[6] although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." *Morrissey*, 408 U.S. at 482.

There are two important stages in the typical process of parole or probation revocation: preliminary hearing and a final revocation hearing. *Id.* at 484-88. The final revocation hearing "must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation." *Id.* at 488. "The parolee must have an opportunity to be heard and to show, if he can, that he did not

[6] Although *Morrissey, supra* is limited to parolees, *Gagnon, supra*, makes it clear that *Morrissey* applies equally to parolees and probationers. *Gagnon*, 411 U.S. at 782.

violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." *Id.* The minimum requirements of due process include:

> (a) Written notice of the claimed violations of parole [or probation];
>
> (b) Disclosure to the parolee [or probationer] 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 factfinder as to the evidence relied on and reasons for revoking parole [or probation].

Id. at 489; *see also Moore v. Stamps*, 507 S.W.2d 939, 945 (Mo. App. St.L.D. 1974); *Reiter v. Camp*, 518 S.W.2d 82, 87-88 (Mo. App. K.C.D. 1974).

It is clear, then, that the minimum requirements of due process at a probation revocation hearing include the right to confront adverse witnesses absent a finding of good cause by the hearing official why confrontation should not be allowed.

There was no finding of good cause in either the transcript of Ms. Tankins' probation revocation hearing or in the court's order revoking her probation. (Ex. 1-38). There was no evidence of good cause. (Ex. 1-38). Therefore, unless Ms. Tankins actually had the opportunity to confront adverse witnesses, her right to due process was violated.

2. The reports are testimonial out-of-court statements that do not fall under any recognized exception to the Confrontation Clause, and so they are inadmissible.

The Confrontation Clause, *supra*, applies to "testimonial" statements. *Crawford v. Washington*, 541 U.S. 36, 51 (2004). If a witness's out-of-court statement is testimonial, then it is only admissible if the witness is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Id.* at 54. The Court in *Crawford* specifically rejected the previous approach which "condition[ed] the admissibility of all hearsay evidence on whether it falls under a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness." *Id.* at 60; *see also Ohio v. Roberts*, 488 U.S. 56, 66 (1980), (*abrogated by Crawford*, *supra*).

It is beyond dispute that Ms. Thomas did not have any actual firsthand knowledge of the alleged probation violations about which she testified. Ms. Thomas was the only person who testified substantively and affirmatively about the alleged violations. The substantive testimony about the alleged violations consisted entirely of the three probation reports and information derived therefrom. Ms. Tankins did not have the opportunity to cross-examine the authors of any of the reports or the creators of any of the information, such as the drug tests, the reports were based on. Therefore, if the reports

are testimonial out-of-court statements, and *Crawford* applies, the court should not have admitted the reports or testimony about their contents except through someone with personal knowledge about the alleged violations.

An out-of-court statement is testimonial, generally, if it was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52. Thus, documents "showing the results of the forensic analysis performed on the seized substances" in a cocaine distribution case are testimonial.[7] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308-310 (2009). Similarly, a forensic report showing how much alcohol was in the defendant's blood after a car accident was inadmissible without the testimony of the analyst who performed the test, despite the apparent reliability of the report. *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2715 (2011). "[Statements made to police] are 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

[7] These are exactly analogous to the drug test results contained within the probation reports in this case. Even assuming, *arguendo*, that the probation reports were admissible, the portions of the reports referring to the drug tests, and any testimony from Ms. Thomas derived therefrom, were testimonial under clear United States Supreme Court precedent. *See also State v. March*, 216 S.W.3d 663, 666-67 (Mo. banc 2007) (holding that admission of laboratory report "that was prepared solely for prosecution to prove an element of the crime charged" was non-harmless error under *Crawford*).

prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

On the other hand, "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822 (2006); *see also Michigan v. Bryant*, 562 U.S. 344, 359-66 (2011) (defining "ongoing emergency").

To determine whether a statement is testimonial or not, the United States Supreme Court has developed the primary purpose test. *Ohio v. Clark*, 135 S.Ct. 2173, 2180 (2015). "[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial." *Id.* "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.* The United States Supreme Court seems to consider the totality of the circumstances, including objective motivations of the declarant, the formality of the situation, whether or not there is a police interrogation, and the general context in which the statements were made, when determining the primary purpose of a statement. *Bryant*, 562 U.S. at 375-77.

In this case, the primary purpose of the probation reports was clearly testimonial. Their entire reason for existing is to be used at a probation revocation hearing. *See* § 517.705 (requiring probation and parole officers to make reports generally and after investigations). The officers making the reports do so in order to keep a record of an offender's alleged probation violations so that they can be proved at a probation

revocation hearing. The reports are made in a formal setting, and, in fact, are required by statute. *Id.* There is generally not a police interrogation involved in the reports, although the reports are made by law enforcement officers based on information provided to law enforcement officers. The reports are made in the context of memorializing alleged violations should a hearing be held. They are not made to help resolve an ongoing emergency, or in the heat of excitement, or in any other context that could suggest that they are not testimonial.

Since the primary purpose of the reports is testimonial, they are only admissible if they fall within a recognized exception to the Confrontation Clause. *See Clark*, 135 S.Ct. at 2180. One exception is "declarations made by a speaker who was both on the brink of death and aware that he was dying." *Giles v. California*, 554 U.S. 353, 358 (2008). A second exception "permitted the introduction of statements of a witness who was detained or kept away by the means or procurement of the defendant." *Id.* A third exception is that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause." *Clark*, 135 S.Ct. at 2182. There is nothing on the record to suggest that any of these exceptions applied in this case. (Tr. 1-29).

A fourth potential exception is the business records exception, which is a hearsay exception. "Under *Crawford*, however, falling within a hearsay exception does not resolve the Confrontation Clause issue because *Crawford* divorced the hearsay exceptions from the Confrontation Clause analysis." *State v. March*, 216 S.W.3d 663, 665 (Mo. banc 2007). "Further, the business record exception in 1791 was a narrow one."

Id. Even if the probation violation reports are business records, that does not preclude them from violating Ms. Tankins' right to confront adverse witnesses. *See Id.* at 667.

Because the primary purpose of the reports is testimonial and they do not fall under any recognized Confrontation Clause exception, the reports were inadmissible under *Crawford*, assuming *Crawford* applies to probation revocation hearings. *See State v. Justus*, 205S.W.3d 872, 880-81 (Mo. banc 2006) (holding that statements about alleged sexual abuse made by child to social worker after reported sexual abuse were testimonial because "[t]he circumstances of this case objectively indicate the primary purpose of the interrogations was to establish past events relevant to a later criminal prosecution.").

3. *Crawford* applies at probation revocation hearings.

The precise contours of the right to confrontation at a probation revocation hearing have not been defined. "The exact boundaries of the right to confrontation in a parole [or probation] revocation hearing are imprecise and can only be measured on a case-by-case basis." *State ex rel. Mack v. Purkett*, 825 S.W.2d 851, 855 (Mo. banc 1992). Whether or not *Crawford* applies to probation or parole revocation hearings appears to be an issue of first impression in Missouri.

It is true that probation revocation proceedings are not, strictly speaking, criminal proceedings, and thus "the full panoply of rights due a defendant in such a proceeding does not apply[.]" *Morrissey*, 408 U.S. at 480. However, probation revocation "does result in a loss of liberty." *Gagnon*, 411 U.S. at 782. Thus, defendants are entitled to certain rights at probation revocation hearings. *Id.* "[T]he constitutional standard applicable in this type of post-conviction revocation hearing will sometimes permit the

admission of evidence that would otherwise be inadmissible in a criminal prosecution." *United States v. Martin*, 382 F.3d 840, 844 (8th Cir. 2004).

Morrissey and *Gagnon* were decided on due process grounds. *Morrissey*, 408 U.S. at 482; *Gagnon*, 411 U.S. at 782. Some courts have determined that this means that the Sixth Amendment right to confront adverse witnesses (and thus *Crawford*) does not apply. *See, e.g.*, *Martin*, 382 F.3d at 844 (relying on the Federal Rules of Criminal Procedure to determine the process due at a probation revocation hearing). However, that conclusion fails to analyze *Morrissey* and *Gagnon* in the context in which they were decided.

In both *Morrissey* and *Gagnon*, the United States Supreme Court reviewed state court proceedings following state prosecutions and state probation/parole revocations. *Morrissey*, 408 U.S. at 472-73; *Gagnon*, 411 U.S. at 779-80. The Sixth Amendment applies to the States through the Due Process clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). "Because these rights [those found in the Sixth Amendment, including the right to confront adverse witnesses] are basic to our adversary system of criminal justice, they are part of the 'due process of law' that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States." *Faretta v. California*, 422 U.S. 806, 818 (1975). Not only is the right to confrontation included in "due process," then, but the United States Supreme Court has no way to impose a right to confrontation on the states without recourse to due process. Therefore, the right to confront adverse witnesses, which is a minimum requirement of

due process according to both *Morrissey* and *Gagnon*, can only mean the right to confront witnesses granted to criminal defendants under the Sixth Amendment.

This interpretation is supported by the text of *Morrissey* and *Gagnon*. Both cases specifically state that defendants in parole and probation revocation hearings have "the right to confront and cross-examine adverse witnesses[.]" *Morrissey*, 408 U.S. at 489, *Gagnon*, 411 U.S. at 786. They both use the word "confront," the same word the Sixth Amendment uses.[8] U.S. Const., Amend. VI. This is in addition to cross-examination, which is not explicitly mentioned in the Sixth Amendment. *Id.* If the United States Supreme Court had not intended to reference the right to confrontation, they could have easily limited their language in *Morrissey* and *Gagnon* to the right to cross-examine witnesses. Since it did not so limit itself, it is clear that the Court intended the Sixth Amendment right to confrontation to apply to probation and parole revocation hearings conducted by the states. *See Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (cautioning judges against interpreting words as mere surplusage).

4. Even if *Crawford* does not apply, the admission of the probation violation reports violated Ms. Tankins' right to confront and cross-examine adverse witnesses.

Regardless of whether *Crawford* applies to probation revocation hearings, defendants in such actions have "the right to confront and cross-examine adverse

[8] Technically, the Sixth Amendment uses the word "confronted" because it is written in the passive voice. The difference is immaterial.

witnesses[.]" *Morrissey*, 408 U.S. at 489, *Gagnon*, 411 U.S. at 786. The exact contours of that right hinge on the meaning of the word "confront." *Crawford* discusses the meaning of the right to confront witnesses and its historical understanding at length. *Crawford*, 541 U.S. at 43-50. That discussion makes it clear that a key part of confrontation is to be able to cross-examine witnesses who are the ultimate providers of the evidence against the accused. *Id*. Since defendants at a probation revocation hearing unquestionably have the right to confront adverse witnesses (in the absence of a finding of good cause why they should not – which there was not in this case), such defendants have the right to cross-examine those people ultimately responsible for the evidence against them. Because Ms. Thomas did not have personal knowledge of the violations alleged in the reports, and the State did not call to the stand anyone who did, Ms. Thomas' testimony about the contents of the reports and the admission of the reports into evidence deprived Ms. Tankins of her right to confront and cross-examine adverse witnesses.

5. If the reports are not inadmissible under *Crawford*, then they are inadmissible because they are hearsay without exception and specific portions of them are not admissible because they contain multiple levels of hearsay without exception.

"Hearsay is an out-of-court statement offered for the truth of the matter asserted." *State v. Taylor*, 466 S.W.3d 521, 530 (Mo. banc 2015). "Generally, hearsay statements are inadmissible." *State v. Walker*, 448 S.W.3d 861, 871 (Mo. App. E.D. 2014). However, hearsay may be admissible if it falls under an exception to the hearsay rule.

State v. McFadden, 391 S.W.3d 408, 431 (Mo. banc 2013). One such exception is the business records exception. § 490.680.

Here, the probation reports were out-of-court statements. They were offered for the truth of the matter asserted, i.e., to prove that Ms. Tankins had violated conditions of her probation. The probation reports were hearsay and, therefore, inadmissible unless they fall under an exception. At the hearing, the State claimed that the probation reports were admissible under the business records exception. (Tr. 11). In its order, the court specifically found that the reports were business records under § 490.680. (Ex. 36). In Respondent's Answer/Return, Respondent makes no other argument for the admission of the reports than the business records exception. (Ans. 6). Foundation was not laid for this exception to apply.

Section 490.680 states:

> A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

§ 490.680.

No custodian of records testified at the hearing. (Tr. 1-29). The State did not present an affidavit from the custodian of records stating that the reports were business

records. (Tr. 1-29). The only person who testified about the records was Ms. Thomas. (Tr. 1-29). Therefore, in order for the records to be admissible, Ms. Thomas must be a qualified witness. § 490.680. There was no evidence at the hearing that she was. (Tr. 1-29). The Court made no specific finding that she was. (Ex. 35-37). Other foundational elements were also absent from the hearing.

Ms. Thomas did testify as to the identity of the reports. (Tr. 9-10; 11-12; 12-13). Ms. Thomas did not testify as to the mode of any of the reports' preparation. (Tr. 1-29). She did not testify that Exhibits 1 or 2 (the reports dated October 17, 2013 and November 26, 2013, respectively) were prepared in the normal or regular course of business. (Tr. 1-29). She did not testify that any of the reports were made at or near the time of the acts they described.[9] (Tr. 1-29). She did not testify about the sources of information for the

[9] In fact, she testified that they were not. Ms. Thomas testified that Ms. Tankins failed two drugs tests, one in February of 2013 and one on June 17, 2013. (Tr. 16; 22). It is unclear from the record which report mentioned each of those failed tests. (Tr. 1-29). However, the reports were dated October 17, 2013, November 26, 2013, and June 5, 2015. (Tr. 9; 11; 12). At the absolute minimum, then, the report was prepared 4 months after the alleged violation. At a maximum, the report was prepared 2 years, 4 months, and 4 days after the violation. Ms. Thomas did not testify as to any of the other dates of the alleged violations, except to say that Ms. Tankins had failed, as of July 9, 2013 (minimum time between violation and report: 3 months 8 days, maximum time between violation and report:1 year, 10 months, 27 days) to provide documentation that she had

reports. (Tr. 1-29). She did not testify about the method and time of preparation of the reports. (Tr. 1-29). Based on the record at the hearing, the reports do not satisfy § 490.680. They are hearsay without any exception and, therefore, inadmissible.

Additionally, the court overruled Ms. Tankins' objections of hearsay within hearsay to evidence about the alleged drug violations and Ms. Tankins' alleged arrest for larceny. (Tr. 15-17). The court held that these too were business records. (Tr. 16). However, there was no testimony about these reports on which the alleged probation violations were based. (Tr. 1-29). There was no evidence about who the custodian of the drug test reports or the arrest report was, or who a qualified witness might be to testify about their preparation.[10] (Tr. 1-29). There was no evidence about how they were

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enrolled in an employment program, and that she failed to seek employment, provide her job search log, and pay restitution as of June 17, 2013. (Tr. 20; 22; 1-29).

[10] If the information about the drug test results of the larceny arrest came from anyone besides a probation officer, such as a police officer, then Ms. Thomas was neither the custodian of the reports nor a witness qualified to lay foundation for their admission as business records. *See Purkett*, 825 S.W.2d at 857 ("Police officers and parole officers work for different agencies. The reports of the former do not qualify as business records of the latter."). It is important to note as well that Ms. Tankins challenged the reliability of the drug tests. (Tr. 19-20). Because Ms. Thomas had no personal knowledge of how the tests were done or what the results meant, Ms. Tankins was denied an opportunity to meaningfully confront and cross-examine anyone about the drug tests.

prepared, whether it was in the normal or regular course of business, whether it was at or near the time of the event, or any of the other elements of § 490.680. Even if the probation reports themselves were business records, these portions were still inadmissible hearsay within hearsay with no exception. *See Evinger v. McDaniel Title Co.*, 726 S.W.2d 468, 474 (Mo. App. W.D. 1987) ("Hearsay within hearsay (within hearsay) is only admissible where both (or all) the statement(s) and the original hearsay evidence are within exceptions to the hearsay rule.") (parentheses in original).

It is true that "[t]he exact boundaries of the right to confrontation in a parole [or probation] revocation hearing are imprecise and can only be measured on a case-by-case basis." *Purkett*, 825 S.W.2d at 855. "[I]n deciding whether to consider hearsay at a revocation hearing, the fact finder must engage in a balancing process." *Id.* "The parolee's right to confront witnesses is balanced against the grounds asserted by the government for not requiring confrontation." *Id.*

> First, the fact finder must assess why confrontation is undesirable of impractical. Where it would be difficult or expensive to procure live witnesses because of long distances involved, such fact militates in factor of not requiring attendance of the witnesses. A risk of harm to witnesses weighs in favor of denying confrontation. The risk of interference with a pending criminal investigation may, in appropriate cases, weigh in favor of denying confrontation of a particular witness. Lesser administrative problems, such as

> inconvenience, weigh less heavily when balanced against the parolee's right to confront witnesses.
>
> A second factor that must be considered is whether the hearsay evidence sought to be admitted bears substantial indicia of reliability. […]
>
> Hearsay may have indicia of reliability because it is corroborated in whole or in part by the testimony of live witnesses or by admissions of the parolee.
>
> An additional factor to be considered in the balancing process is whether the parolee challenges the accuracy of the hearsay evidence during the course of the hearing. The failure of the parolee or probationer to complain regarding the accuracy of the evidence and assert that he is being denied the right to confront and cross-examine witnesses weighs heavily in favor of denying such claim in a subsequent habeas corpus proceeding.

Id. at 855-56.

The court did not engage in this balancing process. (Tr. 1-29; Ex. 35-37). The court never assessed why confrontation was undesirable or impractical. (Tr. 1-29). The State never gave a reason why it did not call a witness with actual personal knowledge of the alleged violations. (Tr. 1-29). There was no evidence that it was difficult or expensive to procure live witnesses for any reason, let alone because of distance. (Tr. 1-29). There was no evidence of a risk of harm to witnesses, and there was no evidence that Ms.

Tankins had ever been accused of anything violent. (Tr. 1-29). There was no evidence that there was a risk of interference with a pending criminal investigation. (Tr. 1-29). This first factor cannot possibly militate in favor of the state.

The court arguably may have considered the second factor when it ruled that the reports were admissible as business records. However, to the extent that the court did consider this factor, it did not accurately do so, because it erroneously ruled that the reports were business records and that the hearsay contained within the reports was admissible.

The reports were not corroborated in whole or in part by the testimony of any live witness with independent knowledge or by Ms. Tankins. (Tr. 1-29). Ms. Thomas testified as to the contents of the reports, but it was very clear that she did not have any personal knowledge of the events detailed therein aside from what she read in the reports. (Tr. 19). That is not corroboration.

"Bare assertions of administrative inconvenience are perhaps the weakest justification for denying confrontation." *Purkett*, 825 S.W.2d at 857. "This is especially true where there is no effort to present any live witnesses or a conventional substitute for live witnesses that can confirm a single element of the cause for revocation." *Id.* In this case, the State did not even cite administrative inconvenience as a justification for denying Ms. Tankins her right to confront adverse witnesses. (Tr. 1-29). The State offered no justification whatsoever. (Tr. 1-29). There is nothing on the record to suggest that the State made any effort to present a live witness who had independent knowledge

with which he or she could confirm the violations alleged in the probation violation reports. (Tr. 1-29).

In addition, *Morrissey*'s requirement that confrontation be allowed unless the hearing officer specifically finds good cause for not allowing confrontation "must be met as a precondition to considering purely hearsay statements of persons not subject to confrontation." *Purkett*, 825 S.W.2d at 857. In this case, there was no such finding. (Tr. 1-29; Ex. 35-37).

6. Conclusion

The court erred in admitting the probation reports into evidence and allowing Ms. Thomas to testify as to their contents. Meaningful confrontation was impossible because Ms. Thomas had no independent personal knowledge of the alleged violations and there was no finding that good cause justified such limited opportunity for confrontation. The evidence was hearsay (within hearsay) with no exception. The error prejudiced Ms. Tankins in that, but for the court's erroneous admission of this evidence, there is a reasonable probability that the result of the hearing would have been different and that Ms. Tankins' probation would not have been revoked. The court's error deprived Ms. Tankins of her rights to due process of law and to confrontation in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must issue a writ of mandamus or prohibition ordering Respondent to reinstate Ms. Tankins' probation and not sentence her.

ARGUMENT II

The hearing court erred by failing to make specific findings of fact about what conditions of her probation it found Ms. Tankins had violated and by failing to specify the factual basis for the revocation of Ms. Tankins' probation. But for this error, there is a reasonable probability that the outcome of the hearing would have been different. By failing to make specific factual findings and failing to specify the reason Ms. Tankins probation was revoked, the trial court deprived Ms. Tankins of her right to due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution.

Standard of Review

"A writ of mandamus is the appropriate remedy for a party to enforce a right that is clearly established and presently existing." *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998). "By contrast, prohibition will lie only where necessary to prevent a usurpation of judicial power, to remedy an excess of jurisdiction, or to prevent an absolute irreparable harm to a party." *Id.* "Prohibition will lie when there is an important question of law decided erroneously that would otherwise escape review by this Court, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994).

"Mandamus is a discretionary writ that is appropriate where a court has exceeded its jurisdiction or authority and where there is no remedy through appeal." *State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158, 159 (Mo. banc 2007). "If the error is one of law,

and reviewable on appeal, a writ of prohibition is not appropriate." *Mummert*, 887 S.W.2d at 577. "As there is no right to appeal a probation revocation order, […] validity of the probation revocation order […] can only be reviewed through an extraordinary writ." *State ex rel. Poucher v. Vincent*, 285 S.W.3d 62, 64 (Mo. banc 2008).

"This Court has the authority to issue and determine original remedial writs." *State ex rel. McKee v. Riley*, 240 S.W.3d 720, 725 (Mo. banc 2007). "Prohibition is an extraordinary remedy to prevent exercise of extrajurisdictional power and is not a writ of right." *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. banc 1999). "A writ of prohibition is appropriate in three scenarios: to prevent the trial court from usurping judicial power when it lacks the requisite jurisdiction, to remedy an excess of jurisdiction or abuse of discretion when the lower court lacks the power to act, and to prevent a party from suffering irreparable harm." *State ex rel. Brantingham v. Grate*, 205 S.W.3d 317, 319 (Mo. App. W.D. 2006).

The general rule is that no appeal lies from the dismissal or denial of a petition for a writ of mandamus. *See Harkins v. Mitchell*, 911 S.W.2d 689, 690 (Mo. App. E.D. 1995) (holding no appeal permitted from dismissal of writ of mandamus petition). The "remedy is a direct application for writ of mandamus to a higher court." *Id.*

Argument

The written order revoking Ms. Tankins' probation was constitutionally deficient. By failing to make specific findings of fact and failing to specify the reason(s) the court found sufficient to revoke Ms. Tankins' probation, the hearing court violated her right to due process as described in *Morrissey*, *supra*, and *Gagnon*, *supra*.

"*Morrissey* requires a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole." *Belk v. Purkett*, 15 F.3d 803, 814 (8th Cir. 1994). "While the sentencing court is not required to elaborate upon the reasons for a course not taken, it must specifically state the reason for its decision and the evidence relied upon to provide an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence." *Id.*

"Under Missouri law, the determination to revoke probation was at the discretion of the trial judge, who was obligated to make independent findings and conclusions apart from any recommendation of the probation officer." *Black v. Romano*, 471 U.S. 606, 615 (1985); *see also Moore v Stamps*, 507 S.W.2d 939, 948-49 (Mo. App. St.L.D. 1974).

In *Ex parte Ryan v. Wyrick*, the State alleged that the defendant failed to report to his probation officer and abide by the probation officer's directives and that he associated with persons convicted of crimes. 518 S.W.2d 89, 92 (Mo. App. K.C.D. 1974). The court revoked the defendant's probation after an evidentiary hearing. *Id.* at 93. In its written order, the court wrote, "[n]ow comes the Court and for good decision, but (to the extent here relevant) [sic] granted to the defendant herein on July 23, 1973, be revoked and terminated." *Id.* at 93-94. The defendant argued that the order was a plain violation of the requirement that the fact finder set out its reasons for revoking probation. *Id.* The court stated that "[w]e should agree that such a fragmentary order standing alone constitutes neither a written statement of evidence nor reasons for the revocation action." *Id.* at 94. The court ultimately upheld the revocation because the fact finder had orally included on the record reasons for revoking the probation. *Id.* The court reasoned that the purpose of

requiring a written statement detailing the reasons for revocation was to keep a record for review. *Id.* Because the fact finder's oral statements as to the reasons for revocation accomplished this goal, the lack of a written reason was not fatal. *Id.*

Here the court's order revoking Ms. Tankins' probation failed to specify any reason why the court revoked her probation. (Ex. 35-37). It also failed to specify what, if any, evidence the court found credible. (Ex. 35-37). The court's order described the evidence adduced at the hearing, but due process demands that specific findings be included in the court's order. *See Id.* at 94. This case is unlike *Wyrick*, however, because at no point during Ms. Tankins' hearing did the court recite what justified revocation or what evidence the court found credible.

The failure of the court to specify why it was revoking Ms. Tankins' probation and to make specific findings of fact deprived Ms. Tankins of her right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution. This Court must issue a writ of mandamus or prohibition ordering Respondent to reinstate Ms. Tankins' probation and not sentence her.

ARGUMENT III

The hearing court erred in compelling Ms. Tankins to take the stand for no other purpose than so that she could invoke her Fifth Amendment privilege against self-incrimination and in drawing a negative inference from her having done so. But for Ms. Tankins' taking the stand and the negative inferences drawn therefrom, there is a reasonable probability that the outcome of the hearing would have been different and Ms. Tankins' probation would not have been revoked. By compelling her to take the stand and drawing negative inferences, the hearing court deprived Ms. Tankins of her right to due process of law and her privilege against self-incrimination in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 19 of the Missouri Constitution.

Standard of Review

"A writ of mandamus is the appropriate remedy for a party to enforce a right that is clearly established and presently existing." *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998). "By contrast, prohibition will lie only where necessary to prevent a usurpation of judicial power, to remedy an excess of jurisdiction, or to prevent an absolute irreparable harm to a party." *Id.* "Prohibition will lie when there is an important question of law decided erroneously that would otherwise escape review by this Court, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994).

"Mandamus is a discretionary writ that is appropriate where a court has exceeded its jurisdiction or authority and where there is no remedy through appeal." *State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158, 159 (Mo. banc 2007). "If the error is one of law, and reviewable on appeal, a writ of prohibition is not appropriate." *Mummert,* 887 S.W.2d at 577. "As there is no right to appeal a probation revocation order, […] validity of the probation revocation order […] can only be reviewed through an extraordinary writ." *State ex rel. Poucher v. Vincent,* 285 S.W.3d 62, 64 (Mo. banc 2008).

"This Court has the authority to issue and determine original remedial writs." *State ex rel. McKee v. Riley*, 240 S.W.3d 720, 725 (Mo. banc 2007). "Prohibition is an extraordinary remedy to prevent exercise of extrajurisdictional power and is not a writ of right." *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. banc 1999). "A writ of prohibition is appropriate in three scenarios: to prevent the trial court from usurping judicial power when it lacks the requisite jurisdiction, to remedy an excess of jurisdiction or abuse of discretion when the lower court lacks the power to act, and to prevent a party from suffering irreparable harm." *State ex rel. Brantingham v. Grate,* 205 S.W.3d 317, 319 (Mo. App. W.D. 2006).

The general rule is that no appeal lies from the dismissal or denial of a petition for a writ of mandamus. *See Harkins v. Mitchell*, 911 S.W.2d 689, 690 (Mo. App. E.D. 1995) (holding no appeal permitted from dismissal of writ of mandamus petition). The "remedy is a direct application for writ of mandamus to a higher court." *Id.*

Argument

1. Compelling Ms. Tankins' testimony

Adverse parties may generally be compelled to testify in civil matters. *See* § 491.030. There are exceptions to this rule, though. "[A] witness has a constitutional right not to testify against himself in a civil proceeding where his answers might incriminate him in a future criminal proceeding." *Tweedy v. Director of Revenue*, 412 S.W.3d 389, 398-99 (Mo. App. E.D. 2013); *see also State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 562 (Mo. banc 2012). "The right to invoke the privilege against self-incrimination extends not only to answers which would in themselves support a conviction of a crime but likewise embraces those answers which would simply furnish a link in the chain of evidence needed to convict the witness." *Nothum*, 380 S.W.3d at 562.

Another exception is that it is "improper to require a witness to take the stand solely for the purpose of invoking his privilege against self-incrimination." *State v. Sidebottom*, 753 S.W.2d 915, 922 (Mo. banc 1988); *see also In re Berg*, 342 S.W.3d 374, 385-86 (Mo. App. S.D. 2011).

Many jurisdictions have held that proceedings related to probation represent another exception to the general rule because of their role in the criminal process. *People v. Manser*, 432 N.W.2d 348, 350 (Mich. Ct. App. 1988) ("This fundamental privilege against compulsory self-incrimination accompanies a criminal defendant throughout the entire course of every criminal prosecution, including both sentencing and any subsequent probation revocation proceeding.").[11]

[11] *See e.g.*, *James v. State*, 75 P.3d 1065, 1072 (Alaska Ct. App. 2003) (holding that defendant's probation could not be revoked on the basis that he failed to receive sex

In *Berg*, the State called the defendant to testify when it "admittedly knew that Appellant was likely to invoke his Fifth Amendment right to not incriminate himself if he were called to testify[.]" *Berg*, 342 S.W.3d at 386. "[H]owever, the State called Appellant in an attempt to lay the foundation for a letter authored by Appellant to M.P.'s mother that it read to the jury in opening statement." *Id.* "Appellant's testimony, therefore, could have provided legitimate testimony relating to the letter and its authenticity." *Id.* "Further, it is not lost on this Court that Appellant testified under oath at a deposition prior to trial." *Id.* Because the State asked questions to which the defendant could not assert his Fifth Amendment privilege, and because he had testified at a prior deposition, it was not error to require the defendant to take the stand. *Id.*

In this case, the State called Ms. Tankins to the stand. (Tr. 22). She objected on self-incrimination grounds. (Tr. 23-24). At that point, the State knew or reasonably should have known that Ms. Tankins was going to assert her Fifth Amendment privilege against self-incrimination in response to its questions. There is no evidence that Ms. Tankins previously testified as to her alleged probation violations at a prior deposition. (Tr. 1-29). The State did not ask any questions that had a purpose other than getting Ms. Tankins to incriminate herself or exercise her privilege against self-incrimination. *See Statement of Facts, supra*. Since none of the exceptions that existed in *Berg* are present

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treatment because he refused to admit his guilt of the crime he was convicted of); *State v. Imlay*, 813 P.2d 979, 985 (Mont. 1991) (same); *State v. Cate*, 683 A.2d 1010, 1018 (Vt. 1996) (same); *Mace v. Amestoy*, 765 F.Supp. 847, 851-52 (D. Vt. 1991) (same).

here, the court erred when it allowed the State to call Ms. Tankins to the stand over her objection. *See also Sidebottom*, 753 S.W.2d at 922.

Respondent argues in his Answer/Return that "Berg does not apply to the case at hand for the reason that relator was not called to assert her privilege before a jury." (Ans. 12). However, Berg is based on Sidebottom. In both cases, it happened to be true that the defendant was called to assert his privilege in front of the jury. It is clear from a close reading of Sidebottom, though, that that fact is not dispositive. Sidebottom, 753 S.W.2d at 922 ("Therefore, it would be improper to require a witness to take the stand solely for the purpose of invoking his privilege against self-incrimination.").

Respondent has not disputed in its Answer/Return that Ms. Tankins was called to the stand solely for the purpose of asserting her Fifth Amendment privilege against self-incrimination. (Ans. 1-13). Any fact not disputed in the Answer/Return is presumed to be true. State ex rel. Bliss v. Grand River Drainage District of Livingston and Linn Counties, 49 S.W.2d 121, 124 (Mo. banc 1932) ("The only allegation of the alternative writ traversed by the return is the averment that relators are the owners and holders of the coupons and bonds, the payment of which they seek to compel. All other allegations of the writ therefore stand admitted."); see also State ex rel. Aubuchon v. Jones, 389 S.W.2d 854, 586 (Mo. App. St.L.D. 1965) ("All allegations of the petition and the alternative writ properly pleaded and not denied by respondent in his return are admitted to be true."). Therefore, Respondent has admitted that the only purpose the State had in calling Ms. Tankins to the stand was for her to invoke her privilege against self-incrimination. Since that purpose violates her rights under the Fifth and Fourteenth Amendments to the United

States Constitution, Respondent has admitted that it was error to allow the State to call Ms. Tankins to the stand.

A defendant in a civil case can also refuse to testify under the Fifth Amendment if the testimony asked for could subject him to future criminal liability. *Tweedy*, 412 S.W.3d at 498-99. The Fifth Amendment does not apply only when the testimony the State seeks from the witness could directly lead to a separate prosecution, but instead the Fifth Amendment's protection applies "where the answer might tend to subject to criminal responsibility him who gives it." *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924). *McCarthy* does not limit Fifth Amendment protection to only cases in which an answer could form the basis of a future prosecution. *Id.* It expressly does the opposite, and applies the Fifth Amendment protection to all cases in which an answer could lead to any criminal responsibility, such as probation revocation. *Id.* The United States Supreme Court has reaffirmed this principle. *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951) ("To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.").[12]

[12] Because the State asked Ms. Tankins directly about the alleged probation violations, it is evident from the implications of the questions and the setting in which they were asked that responsive answers could prove injurious to Ms. Tankins in that responsive answers could serve as the basis for her probation being revoked and her subsequent incarceration.

The State asked Ms. Tankins to directly admit all the probation violations it had alleged. (Tr. 23-27). Had Ms. Tankins admitted them, the court could have found her testimony reliable, revoked her probation, and sentenced her to incarceration. Incarceration is criminal responsibility. The answers to the questions, then, might have tended to subject Ms. Tankins to criminal responsibility. The Fifth Amendment protected her.

Further, the questions the State asked Ms. Tankins could lead to future prosecutions. The State asked whether she had tested positive for marijuana. (Tr. 24-25). While possession of marijuana under 35 grams can be a misdemeanor charge with a statute of limitation of only one year, any amount over 35 grams is a Class C felony. 195.202. Distribution, delivery, manufacturing, producing, and possession with intent to deliver over 5 grams of marijuana is a Class B felony, and under 5 grams are Class C felonies. 195.211. Therefore, Ms. Tankins' answer to this question could very well lead to criminal prosecution for a felony charge that was still available to the State.

The State also asked Ms. Tankins if she had been arrested for larceny. This line of questioning could very easily lead to future criminal prosecution. Stealing from a person is Class C Felony. 570.030. There are numerous other special categories of stealing that are Class C felonies as well, such as stealing a credit card; a firearm; a controlled substance; and more. *Id.* As the State did not put before the court the specifics of the allegations against Ms. Tankins and they are not part of the record in this proceeding, it is pure speculation on the part of the State to assume that this could not lead to future prosecution.

The other questions the State asked were about Ms. Tankins' alleged failure to make restitution payments, whether she had paid any fees while on probation, whether she had enrolled in a structured employment program, whether she had provided any job search logs, and whether she had stopped reporting to her probation officer. Answering these questions could lead to Ms. Tankins' being prosecuted for either perjury or tampering with a judicial officer.

> A person commits the crime of perjury if, with the purpose to deceive, he knowingly testifies falsely to any material fact upon oath or affirmation legally administered, in any official proceeding before any court, public body, notary public, or other officer authorized to administer oaths. A fact is material, regardless of its admissibility under rules of evidence, if it could substantially affect, or did substantially affect, the course or outcome of the cause, matter or proceeding.

§ 575.040.

> A person commits the crime of tampering with a judicial officer if, with the purpose to … influence a judicial officer in the performance of such officer's official duties, such person …uses … deception against or toward such judicial officer or members of such judicial officer's family…

§ 565.084.

Both are Class C felonies. § 575.040; § 565.084. Had Ms. Tankins denied any or all of these alleged probation violations, she could have been charged with either one of these crimes, as her answers are contrary to what the State alleged its evidence is of her probation violations. Her statements would have been under oath and made to a judicial officer in an attempt to influence him into reinstating her probation. Furthermore, if Ms. Tankins had given any contradictory statements to her probation officer earlier (also a judicial officer), this could lead to charges of tampering with a judicial officer by deception.

Because the questions the State asked Ms. Tankins could have led to criminal prosecution, it was error to allow the State to ask them and for the court to draw a negative inference from Ms. Tankins' assertion of her privilege against self-incrimination.

2. Adverse Inferences

"The normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted." *Mitchell v. United States*, 526 U.S. 314 (1999). "[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). The reason an adverse inference is acceptable in civil but not criminal cases is because in criminal cases, "the stakes are higher and the State's sole interest is to convict[.]" *Id.* at 318-19.

It appears that whether a negative inference may be drawn from a defendant's invocation of his or her right against self-incrimination at a probation revocation hearing

is an issue of first impression in Missouri. This Court should hold that no adverse inference may be drawn. If this Court finds that this is not an issue of first impression, and the law allows such an inference, this Court should overrule that precedent.

While it is true that probation revocation hearings are technically civil proceedings, the State's interest in the proceedings are the same.[13] In *Baxter*, the United States Supreme Court declined to extend Fifth Amendment protections to civil defendants in disciplinary proceedings in state prisons. *Id.* at 319. In prison disciplinary hearings, the state has an interest in keeping order within its prisons and ensuring the proper rehabilitation and deterrence of prisoners. Those interests do not apply at a probation revocation hearing. At a probation revocation hearing, the only interest the state has is finding that the defendant has violated the conditions of his or her probation and revoking it. There is no interest in keeping order in prisons,[14] deciding whether or not a person is a citizen,[15] or any other interest besides incarcerating an alleged offender.

If a probationer's probation is revoked, that person will be incarcerated. Incarceration is a drastic sanction that can destroy lives and disrupt families. *See, e.g.*, *Reiter v. Camp*, 518 S.W.2d 82, 87 (Mo. App. K.C.D. 1974) ("[A] revocation of

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[13] *See, e.g.*, *People v. Manser*, 432 N.W.2s 348, 350 (Mich. Ct. App. 1988) ("However, it is axiomatic that a probation revocation hearing is an integral part of the criminal prosecution/sentence process.")

[14] *Baxter*, 425 U.S. at 319.

[15] *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923).

probation represents a grievous loss and deprivation of liberty[.]").Therefore, a holding that a probationer has violated his or her probation must be premised upon evidence more directly probative than a mere inference based upon the probationer's silence. *See Gastelum-Quinonens v. Kennedy*, 374 U.S. 469, 479 (1963) (holding exactly that for deportation). In *Gastelum-Quinonens*, the question before the court was "whether an alien long resident in this country is deportable because, for a period during 1949 and 1950, he paid dues to and attended several meetings of a club of the Communist party in Los Angeles." *Id.* at 470. At the time, those facts arguably established grounds for deportation. *Id.* The Government called two witnesses to testify, but still did not prove either that the defendant knew of the Communist Party as a political entity or the qualitative nature of the defendant's activities in the Communist Party. *Id.* at 479. The Government sought "the benefit of an inference, based upon petitioner's failure to produce or elicit evidence in response to the Government's proof that he paid dues to the Party and attended some meetings, that his association with the Party was more than the mere voluntary listing of his name on Party roles." *Id.* "With the facts concerning the nature of petitioner's association perhaps near at hand, and in light of both the possibility that those facts would not be consistent with a finding of meaningful association and the harshness of the deportation sanction, we cannot sustain petitioner's deportation upon a bare inference which the Government would have us derive from petitioner's failure to introduce evidence in response to the Government's proof of his dues-paying membership and sometime attendance at Party meetings." *Id.* at 479-80.

In this case, the State could have called to the stand someone with personal knowledge of Ms. Tankins' alleged probation violations. There is nothing on the record to suggest that any of the following people, all of whom had personal knowledge about at least one of the alleged probation violations were unavailable to testify: Ms. Tankins' probation officer at the time of the alleged violations; the author of any of the three reports; any of the lab technicians who tested Ms. Tankins' urine; court employees in charge of collecting restitution; the prosecutor who allegedly charged Ms. Tankins with petty larceny; the police officer who allegedly arrested Ms. Tankins for petty larceny; or anyone else besides Ms. Tankins with personal knowledge of the alleged violations. There is nothing on the record to suggest why any of these people were not called to testify. There is no reason to think that they, and the direct evidence they could have provided about the alleged violations were not "near at hand." *Id.* at 479. It is also possible that their testimony would not be consistent with a finding that Ms. Tankins had violated her probation. *See Id.* Incarceration, like deportation, is a harsh sanction. *See Id.* Therefore, allowing the State to take advantage of the fact that Ms. Tankins did not put on evidence at the hearing, including her own testimony, is impermissible.

Policy concerns also militate for disallowing courts from drawing negative inferences from a defendant's assertion of his or her privilege against self-incrimination at a probation violation hearing. If such a negative inference could be drawn, then the State would never need to call any witness besides the defendant. The defendant would have to either admit the violations, in which case his or her probation would be revoked and he or she could be subject to criminal prosecutions; deny the violations, in which

case the defendant opens himself or herself up to perjury and obstruction of justice claims; or invoke his or her privilege against self-incrimination, in which case the court would draw a negative inference and his or her probation would be revoked anyway. Allowing courts to draw these negative inferences puts defendants in an untenable and unfair no-win situation wherein every option leads to incarceration. It is not a choice but rather the false illusion of a choice. This surely does not meet the minimum standards of due process outlined in *Morrissey* and *Gagnon*.

In the alternative, the State cannot compel a defendant to testify without a grant of immunity if there is some rational basis for believing that the testimony will incriminate the defendant. *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984). In that case, the defendant did not assert his Fifth Amendment privilege against self-incrimination, so the United States Supreme Court ruled that the statements he made to his probation officer at a meeting when the officer questioned him were admissible. *Id.* at 425. However, the United States Supreme Court emphasized that it is "clear that a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." *Id.* at 434. The Court found that there was a difference between "probation conditions [that] merely required [the defendant] to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent." *Id.* at 436. The former is allowable; the latter is not. *Id.* In drawing a negative inference from Ms. Tankins' invocation of her privilege against self-incrimination, however, the court forced her to jeopardize her conditional liberty by remaining silent.

Thus, the hearing court erred and abused its discretion in compelling Ms. Tankins to take the stand to invoke her Fifth Amendment privilege against self-incrimination and in drawing a negative inference therefrom. This error prejudiced Ms. Tankins. The hearing court deprived Ms. Tankins of her right to due process of law and privilege against self-incrimination in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 19 of the Missouri Constitution. This Court must issue a writ of mandamus or prohibition ordering Respondent to reinstate Ms. Tankins' probation and not sentence her.

CONCLUSION

WHEREFORE, based on her arguments in Point I, II, and II of her brief, Relator Sharonda Tankins requests that this Court issue a writ of mandamus or prohibition ordering Respondent to reinstate Ms. Tankins' probation and not sentence her..

Respectfully submitted,
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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(h) and Special Rule 333(e), I hereby certify that on Monday, March 21, 2016, a true and correct copy of the foregoing was e-filed with this Court and sent to Christopher Faerber, attorney for Respondent, via the Missouri E-Filing System Clerk. In addition, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and contains 13, 317 words.

Respectfully submitted,
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