NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

JON DUKE DEPRIEST

Petitioner

Vs.

STATE OF FLORIDA

Respondent.

On Petition for Writ of *Certiorari* to the

Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF *CERTIORARI*

JON DUKE DEPRIEST, DC#110648
PRO SE Petitioner
Union Correctional Institution
P.O. Box 1000
Raiford, Florida 32083

QUESTIONS PRESENTED

1. WHETHER PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM WERE VIOLATED WHEN THE PROSECUTOR PROVIDED TESTIMONIAL HEARSAY STATEMENTS AND PHYSICAL EVIDENCE OF A NON-LISTED AND NON-TESTIFYING WITNESS TO PROVE THE TRUTH OF THE MATTER ASSERTED IN CONTRAVENTION OF THE SUPREME COURT'S DECISION IN CRAWFORD AND IT'S PROGENY.

2. WHETHER PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHERE PETITIONER PRESENTED CLAIMS OF SIXTH AMENDMENT CONFRONTATION CLAUSE VIOLATIONS TO THE STATE AND FEDERAL COURTS WHERE THE COURTS REMAINED SILENT TO AND NEVER ADDRESSED OR RULED UPON THE MERITS OF THE CLAIMS SUSPENDING PETITIONER'S HABEAS CORPUS REVIEW OF THOSE CLAIMS.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the Cover page.

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PETITION FOR WRIT OF *CERTIORARI*

Jon Duke DePriest, *pro se* respectfully petitions for a Writ of *Certiorari* to

review the Florida District Court of Appeal, First District's Order denying relief to Petitioner's Rule 9.141(d), Florida Rules of Appellate Procedure Fla. R.A.P., where there was no opinion given only "denied on merits." The denial appeared to follow the State's response to Show Cause where the State failed to present any arguments, evidence or opinion to the Petitioner's Sixth Amendment, Confrontation claim involving the prosecutor's repeated use of testimonial hearsay statements of a non-testifying witness and this flawed determination remained the basis for the Federal Court's denial of Petitioner's §2254 Petition for Writ of Habeas Corpus and his application for Certificate of Appealability.

DECISIONS BELOW

The decision of the Florida First District Court of Appeal's ruling on Petitioner's 9.141 Petition For Habeas Corpus Review is reported at 115 So. 3d. 1110 (Fla. 1st DCA 2013) and is also attached as Appendix (App "A").

The decision of the United States District Court, Middle District of Florida that ruled upon Petitioner's 28 U.S.C. §2254 Petition For Writ of Habeas Corpus is reported at 2017 LEXIS 103164 (July 3, 2017) and is attached as (App "I").

The decision of the Eleventh Circuit Court of Appeals denying Petitioner's Application for C.O.A. is attached as (App. "K").

The decision of the Eleventh Circuit Court of Appeals denying Petitioner's Second presentment of his application for C.O.A. with Motion For Rehearing is attached as (App "M").

JURISDICTION

On June 28, 2013 the Florida District Court of Appeal, First District issued it's opinion denying Habeas Corpus Relief.

On July 3, 2017 the United States District Court, Middle District of Florida issued it's opinion denying DePriest's 28 U.S.C. §2254 Petition For Writ of

Habeas Corpus and Motion For Evidentiary Hearing.

On January 30, 2018 the Eleventh Circuit Court of Appeals denied Petitioner's Application for C.O.A. and, on March 15, 2018 the Eleventh Circuit Court of Appeals denied Petitioner's Motion For Rehearing on his C.O.A.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a) and under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides: "No person should be deprived of life, liberty, or property without due process of law." U.S. Constitution, Amendment V.

The Sixth Amendment's Confrontation Clause provides, "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. Amend. VI.

The Sixth Amendment also provides, "In all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense." U.S. Const. Amend. VI.

The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. Amend. VIII.

The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

The decision of the Supreme Court of the United States in Crawford v. Washington, 541 U.S. 36 (2004), which states in relevant part: "The admission of a hearsay statement made by a declarant who does not testifies at trial violates the

Sixth Amendment Confrontation Clause if (1) the statement is testimonial, (2) the declarant is unavailable, and (3) the defendant lacked any prior opportunity for cross-examination of the declarant." The Court emphasized that if 'testimonial' evidence is at issue, the Sixth Amendment demands what common law required; unavailability and a prior opportunity for cross-examination" (Crawford, 541 at 68)

The decision of the Supreme Court of the United States in Davis v. Washington, 547 U.S. 813 (2006) which states in relevant part: "Only 'testimonial statements ' cause the declarant to be a 'witness' within the meaning the Confrontation Clause." "Statements are testimonial when there is NO ongoing emergency and the statement is made under circumstances objectively indicating that the primary of the interrogation is to prove past events that are potentially relevant to future criminal prosecution." Id. at 822.

The decision of the Supreme Court of the United States in Michigan v. Bryant, 131 S. Ct. 1143 (2011) "Even where such an interrogation is conducted with all good faith, ' [I]ntroduction of the resulting statements at trial can be unfair to the accused if they are untested by cross-examination.' Whether Formal or Informal, out of court statements 'evade the basic objective of the Confrontation Clause,' which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial." Id. at 1152.

Florida law protects an accused from the intentional use of out of court testimonial hearsay statements of a non-testifying declarant of such statements, if it is offered to prove the truth of the matter asserted (90.801(1)(c)), Florida Statutes.

Florida law, Rules of Evidence (Section 90.401.4) states: "If counsel attempts to prove the contents of the inaudible portions of a tape recording, the Florida decisions apparently require the testimony of a person with 'personal knowledge' of the contents of the conversation recorded, or of an expert witness skilled in interpreting inaudible tape recordings."

STATEMENT OF THE CASE

1. INTRODUCTION

It is well settled that Florida Law protects an accused from the 'intentional' use of out-of-court testimonial hearsay statements of a non-testifying declarant of such statements if, it is used to prove the truth of the matter asserted. §90.801(1)(c); Florida Statutes.

Additionally, Rule 805, Federal Rules of Evidence protects an accused against the use of 'double hearsay' and it's use is suspect under the Confrontation Clause of the Sixth Amendment since the defense attorney would be unable to cross-examine the declarant or witness of the double-hearsay concerning the reliability of his or her source of the statements which in turn relies upon hearsay statements of another's testimony referring to unidentified informant's account of various hearsay.

Further, the Confrontation Clause of the Sixth Amendment to the United States Constitution and the decisions of the Supreme Court of the United States in 'Crawford v. Washington, 541 U.S. 36 (2004); Davis v. Washington, 547 U.S. 813 (2006); and Michigan v. Bryant, 131 S. Ct. 1143 (2011), bar the use of testimonial hearsay statements of a non-testifying witness where:

> 1). The primary purpose of the interviews or interrogation
> By law enforcement of the non-testifying witness was to gather incriminating evidence against the accused.
> 2). There was no on-going emergency and statements of the non-testifying witness were made under circumstances objectively indicating that the primary purpose of the interviews or interrogations by law enforcement was to prove past events that are potentially relevant to future criminal

prosecution, and

3). The defendant lacked any opportunity to question the declarant about his / her statements.

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner presented to the State District Court of Appeal in his Rule 9.141(d) Petition For Writ of Habeas Corpus at Grounds (1) and (2) specific arguments demonstrating the prosecutor's intentional and repeated use of testimonial hearsay statements of a non-testifying witness in contravention of the Sixth Amendment's Confrontation Clause and the decisions of the Supreme Court of the United States in "Crawford," "Davis" and "Michigan v. Bryant. (App-B).

Trial Counsel preserved the issue for direct appeal through contemporous objection during trial citing the Sixth Amendment's Confrontation Clause and the Supreme Court's decision in Crawford v. Washington. At the time of defense counsel's objection the State was attempting to introduce into evidence a tape recorded phone call allegedly between the non-testifying witness Michelle Dotson whom was not listed as a State witness. The content of the tape recording was being utilized to corroborate prosecutor's opening statements, wherein Petitioner was purportedly inculpated by the non-testifying witness, Ms. Dotson.[1]

Contrary to what the prosecutor averred at trial "that the State was not attempting to use Ms. Dotson's testimony against the defendant. The recording is being used for the defendant's own admissions and confessions on the recording." "Ms. Dotson's statements are only relevant in as far as they prompt a response from Mr. DePriest.... It's not necessary for .... The detective's responses are not relevant. They would be hearsay if they were used to prove the fact." (T.T. pg.

[1] State's amended list shows that the State omitted Michelle Dotson's name as a witness. This witness list was provided to the defense on the day of trial.

157).

The State did in fact, disclose to the Jury detailed information implicating Mr. DePriest of a crime, facts and information supplied by Ms. Dotson to Detective Rose during her investigation. This was not information or facts supplied to the Jury by Mr. DePriest through "Adoptive Admissions" on the tape recording. It was information provided to the Jury through the testimonial hearsay statements of Ms. Dotson through the prosecutor's opening and closing arguments, in a manner calculated to circumvent the Sixth Amendment's Confrontation Clause and the decision of the Supreme Court in "Crawford", "Davis" and "Michigan v. Bryant."

The questions supplied to Ms. Dotson by Detective's Rose and Patterson, were designed to inculpate the defendant regardless of his responses. The tape recorded phone call contained approximately 90% inaudible and unintelligible responses of the Petitioner while the questions of the non-testifying witness were clear and the prosecutor in his opening arguments previously provided the Jury his impression or opinion as fact of what Petitioner's responses were. Petitioner made NO "adoptive admissions" or confessions in any of his responses as stated by the prosecutor.

Out of hearing of the Jury the tape recorded phone call was played several times in an attempt to obtain clarity but was unsuccessful and the Judge stated on the record, "I couldn't understand a word of that, put that on the record." [Trial Transcript.. pg. 285]. Indeed, the Court Reporter provided a trial transcript statement noting that "the Court instructed me not to worry about taking audio because it was totally inaudible, but I told him that we need to take what we can for appeal purposes, which I was not able to understand one complete sentence or to even be able to distinguish between who was speaking, the male or the female."

[Trial Transcript, pg. 278][2], (Ex "5").

Further, trial counsel's Confrontation Clause objection was directed towards the prosecutor's testimonial hearsay statements about how Ms. Dotson came into possession of the Mickey Mouse Pin. The prosecutor stated in his opening and closing arguments that Ms. Dotson received the Mickey Mouse Pin from the defendant and that this evidence alone would be sufficient to convict the defendant of dealing in stolen property. [Trial Transcript pg. 78-79 Ex. (6) Rule 805 Fed. R. Evid]. This statement to the Jury was false and misleading. Detective Rose's investigative summary clearly stated that Ms. Dotson received the Mickey Mouse Pin from her adult daughter NIKKI and that NIKKI received it from Mr. DePriest. Neither Ms. Dotson or NIKKI testified to this fact. There was no corroborating testimony to this fact by Detective Rose. It was the prosecutor that supplied these incriminating testimonial hearsay statements as facts to the Jury in his opening and closing arguments and instructed the Jury that this evidence alone was sufficient to show the defendant's guilt of delivering property he knew was stolen to Ms. Dotson.

> "Well Michelle Dotson provided a little Mickey Mouse piece of memorabilia that SHE RECEIVED FROM THIS DEFENDANT. She provided it to Detective Rose, and you'll see it in evidence today." (TT 78).
>
> "If that Mickey Mouse Pin is the only piece of evidence that the State had, it would be sufficient to show this defendant's guilt of delivering that piece of property that he knew was stolen to Michelle Dotson." (TT 79).

[2] Trial Judge instructed the Court Reporter about transcribing the taped phone call after the State attempted several times, out of the Jury's hearing, to play the tape so that it could be understood and the Trial Judge remarked after the tape was played before the Jury, on record, "that he couldn't understand a word of that." (T.T.'s pg's. 278-285-Ex. "5").

The record shows that Michelle Dotson received the Mickey Mouse Pin from her daughter NIKKI. (See investigative Summary of Detective Rose at Exhibit "3") (Fed R. Evid. 805).The prosecutor's continuous use of testimonial hearsay statements elaborating on evidence provided by the Confidential Informant and Crime Stopper's Tipster, Michelle Dotson, who did not testify to these facts, where no other witness corroborated these facts, so infected the trial with unfairness as to make the resulting conviction a denial of due process. The prosecutor provided all of these testimonial statements in a calculated manner designed to circumvent the decisions of this Court in "Crawford" and "Davis" and did violate Petitioner's Sixth Amendment might under the Confrontation Clause the prosecutor effectively made himself a witness for the State where the defense was left with no possibility to cross-examine his statements.

Prior to trial a hearing was held arguing the admission of certain evidence. The Court ruled that the State could not detail the sequence of events of the investigation involving Michelle Dotson and name Mr. DePriest through Michelle Dotson's incriminating statements to law enforcement about alleged criminal activity. The prosecutor, in his opening statements violated this order and continued to violate the Court's order when questioning Detective Rose on direct examination. Indeed throughout trial the prosecutor continued to link Petitioner to the crime through hearsay use of a non-listed and non-testifying witness, Michelle Dotson.

In each of the Confrontation Clause violations complained of, that is, the prosecutor's unsupported and uncorroborated testimonial hearsay statements made to the Jury in his opening, closing and rebuttal arguments, facts that were unsupported by the evidence and record at trial clearly demonstrate that the prosecutor's statements were intentional and calculated to circumvent the holdings of this court in, "Crawford" and "Davis" as well as in "Michigan v. Bryant". The

prosecutor in making these statements effectively became a witness for the prosecution and were intended to be an obvious hearsay substitute for the non-testifying witness, Michelle Dotson and in circumspect her daughter NIKKI. The prosecutor was allowed to make these statements by assuring the Court that Michelle Dotson was being sought and would be brought in to testify at trial. (T.T. pg. 157 and T.T. 168-169, Exhibit "4"). However, the prosecution never provided this witness and accordingly the prosecutor's statements to the Jury about what was said on the inaudible and unintelligible tape recorded phone call and about who provided Michelle Dotson with the Mickey Mouse Pin, the only piece of evidence that the State possessed tying Petitioner to the charged criminal act of dealing in stolen property in this case were testimonial and violated Petitioner's Sixth Amendment Right pursuant to the Confrontation Clause and the holdings of this Court in "Crawford," "Davis" and "Michigan v. Bryant."

A prosecutor's remark's mandate a new trial only if they are improper and prejudicially affect the defendant's substantial rights. (See United States v. Thomas, 62 F. 3d. 1332, 1343 (11th Cir. 1995)).

When a prosecutor "[m]akes unsupported factual claims ... [it] is definitely improper." (United States v. Kojayan, 8 F. 3d 1315, 1321 (9th Cir. 1993)). "A defendant's substantial rights are prejudiced if there is a [R]easonable probability that but for the remarks, the outcome would have been different." (Kennedy v. Duggar, 933 F. 2d. 905, 914 (11th Cir. 1991)), Cert. denied, 502 U.S. 1066, 112 S. Ct. 957, 117 L. Ed. 2d. 124 (1992). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" (Strickland v. Washington, 466 U.S. 668 (1984)).

It is clear on the record that the prosecutor made statements to the Jury unsupported by the evidence at trial and uncorroborated by other witness testimony that substantially violated Petitioner's Sixth Amendment Right to Confrontation

and the holdings of this Court in "Crawford," "Davis" and "Michigan v. Bryant," when he provided testimonial hearsay testimony of a non-testifying witness at trial and, his remarks and statements effectively buttressed or vouched for the hearsay of the non-testifying witness, Michelle Dotson when he falsely claimed that the defendant was guilty of providing to Michelle Dotson the Mickey Mouse Pin and thus is sufficient to show the defendant's guilt of delivering property he knew was stolen to Michelle Dotson," when the lead detective's investigative report clearly stated that Michelle Dotson received the Mickey Mouse Pin from her daughter, NIKKI. The prosecutor argued in closing that the Jury should consider the D.N.A. evidence, (1) and the tire tracks (2) where it was determined that the D.N.A. evidence was never tested or was not Petitioner's and the tire tracks found at Mr. Higginbotham's trailer did not match those of Petitioner's vehicle. The prosecutor also urged the Jury to listen to the tape recording again reiterating that although you can't hear what is being said on the recording he could hear it and again restated what could not be heard.

"It is well settled in law that vouching or an assurance by the prosecuting attorney of the credibility of a government witness through personal knowledge or by [o]ther information outside of the testimony before the Jury amounts to improper prosecutorial misconduct." (Lam v. Kelcher, 304 f. 3d. 256, 271 (3rd. Cir. 2002)). See also, (Douglass v. Workman, 560 F. 3d. 1156, 1177-79 (9th Cir. 2009).

Generally, there are two ways in which prosecutorial misconduct, like vouching, can result in Constitutional error." First [it] can prejudice a specific right...as to the denial of that right." See DeRosa v. Workman, 679 F. 3d. 1196, 1222 (10th Cir. 2012)). Quoting Matthews v. Workman, 577 f. 3d. 1175, 1186. "Additionally, absent infringement of a specific Constitutional Right, a prosecutor's misconduct may in some instances render a habeas corpus Petitioner's trial so fundamentally unfair as to deny him due process." (Donnelly v.

DeChristoforo, 416 U.S. 637 (1974)). "Unless a prosecutor's misconduct implicates a specific Constitutional Right, a prosecutor's improper statements require reversal of a State conviction only, if the statements so infected the trial with unfairness as to make the resulting conviction a denial of due process." (Romano v. Oklahoma, 512 U.S. 1, 12-14 (1994)). "statements made by a prosecutor implicitly backed by the authority of his or her office, can have a powerful effect on a Jury." (Serger v. United States, 295 U.S. 78, 88 (1935)), see also eg., United States v. Young, 470 U.S. 1, 7-8 (1985)), and Viereck v. United States, 318 U.S. 236, 248 (1943)).

In the face of clearly established federal law and the decisions of the Supreme Court of the United States in Crawford v. Washington; Davis v. Washington; and Michigan v. Bryant the respondent want this Court to believe it is permissible to allow each of the State agencies, the County Sheriff's Office and the State Attorney's Office to have unrestricted and unlimited access to the "Tipster" witness and her statements during the course of their investigation, then allow the prosecution, at trial, to present these testimonial statements to the Jury as truth and proof of the fact asserted vouching for the credibility of the non-testifying witness and her statements through the prosecutor's testimonial hearsay statements and remarks yet, at the same time completely deny Petitioner's trial counsel access to this witness prior to trial or to be able to cross-examine this witness about her statements to law enforcement at trial. That, in doing so there has been no significant fundamental error or denial of a federal constitutionally protected right. Further, that the denial of that right need not be addressed nor adjudicated on the merits that the courts may choose only one component of an argument and rule solely upon that component to deny relief.

III. STATE COLLATERIAL PROCEEDING

Petitioner argued in his State 9.141(d) Petition at Grounds (1) and (2)—(App

"B") and in his Federal §2254 Petition For Writ of Habeas Corpus, claims (a) and (b)—(App "F") that the State appointed Appellate Counsel rendered ineffective assistance when he failed to present arguments, meritorious and preserved by objection at trial, clearly on the face of the record, demonstrating the prosecutor's continuous use of testimonial hearsay statements, improper comments and remarks of statements and information from the non-testifying witness to prove the truth of the matter asserted in violation of the Sixth Amendment's Confrontation Clause and Florida Statutes §90.801(1)(c) that prejudicially affected the substantial rights of the defendant. Petitioner contacted Appellate Counsel twice concerning the presentation of these claims and that if he refused to present them to respectfully withdraw from representation and allow Petitioner to proceed *pro se.* Appellate Counsel refused to argue these meritorious claims and refused to withdraw from representation and instead without Petitioner's consent immediately filed an appeal arguing a single ground of Inadequate Jury Instruction which was denied *per curiam* affirmed by the State District Court of Appeal. (App – A).

The State responding to the Court's Order to Show Cause failed to address this Sixth Amendment Claim. In fact, the State's response failed to even mention the Sixth Amendment Confrontation Claim and instead argued only the I.A.A.C. part of the claim then misstated the argument and reached a conclusion based solely upon the tape recorded phone call and it's admissibility into evidence. In essence there was no mention of the prosecutor's use of testimonial hearsay statements to the Jury, statements that were a product of the testimonial statements of Michelle Dotson, the State's Key Witness, who did not testify to these facts. These alleged facts were the product of the information gathered through the Nassau County Sheriff's detectives, Charity Rose and Patterson from their interrogations of Michelle Dotson during their investigation. (Appx. "C").

The prosecutor provided false testimony to the Jury about how Michelle

Dotson came into possession of the ONLY piece of evidence linking Petitioner to the crime of dealing in stolen property and emphatically urged the Jury that this single piece of evidence would be sufficient to convict. In truth, the piece of evidence came into the possession of Michelle Dotson through her daughter NIKKI who also did not testify. (App "B" and Exhibit "3" Investigative Summary).

Ironically, there was no corroborating testimony supporting these statements yet the prosecutor, in closing arguments reminded the Jury that this piece of evidence is sufficient to show the defendant's guilt of delivering property to Michelle Dotson that he knew was stolen.

In the Court's (3) three word denial "ON THE MERITS" (App "E") it is reasonable to conclude that their denial was based solely upon the State's response to the show cause order. Petitioner in his reply to the State's response, (App "D") argued these facts of failing to address the actual claim, misstating the claim in the response and urged the Court to review the Petition *de novo*. Petitioner's Motion for Rehearing *en banc* was timely filed after the order of Denial and again the Petitioner raised these arguments and requested the Court to provide an opinion. This Motion was summarily denied with no opinion preventing the Petitioner from Florida Supreme Court Review of these claims. (App "E").

FEDERAL §2254 HABEAS CORPUS REVIEW

Petitioner timely filed his 28 U.S.C. §2254 Petition For Writ of Habeas Corpus to the United States District Court, Middle District of Florida. Petitioner raised the identical claims raised in his State Petition arguing the prosecutor's continuous use of testimonial hearsay statements and physical evidence of a non-listed and non-testifying witness to prove the truth of the matter asserted. These arguments are found in Grounds (1) and (2) in the Petition (App "F").

The State responded just as it did in Petitioner's State Petition for Habeas

Corpus Relief and again was completely silent as to the Petitioner's Sixth Amendment Confrontation Clause claim involving the prosecutor's use of testimonial hearsay statements and physical evidence to prove the truth of the matter asserted. (App "G").

The U.S. District Court applied the State's rationale in it's response and failed to address the Sixth Amendment claim and denied Petitioner's Habeas Corpus Relief. (App "I").

Petitioner moved for a Certificate of Appealability to the Eleventh Circuit Court of Appeals, (App J). The Eleventh Circuit under the Application For Certificate of Appealability violated the Supreme Court's decisions in Buck v. Davis, 137 S. Ct. 759 (2017); Miller-El v. Cockrell, 537 U.S. 322 at 336 (2003) and Slack v. McDaniel, 529 U.S. 473 at 484 (2000) denying Petitioner's Request for C.O.A. by first deciding the merits of an appeal in a habeas proceeding then justifying it's denial of a C.O.A. based on it's adjudication of the actual merits and denied Petitioner a reviewing panel of a minimum of 2 judges. (App L).

Petitioner's Motion For Rehearing was also denied by the Eleventh Circuit. However, this denial consisted of (2) jurists and the Application For Certificate of Appealability was again denied based upon the adjudication of the merits without allowing the Appellate Court to fully renew the Petitioner's claims as presented in Petitioner's 28 U.S.C. §2254 Petition For Writ of Habeas Corpus where the District Court failed to address and remained silent to the Constitutional Sixth Amendment Confrontation Clause Claims in Grounds (1) and (2) involving the prosecutor's use of testimonial hearsay statements of a non-listed and non-testifying witness to prove the truth of the mother asserted. (App M).

V. REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT *CERTIORARI* TO PROVIDE GUIDANCE TO THE FLORIDA COURTS

ABOUT THE PROPER APPLICATION OF CRAWFORD v. WASHINGTON, 541 U.S. 36 (2004) AND IT'S PROGENY SPECIFICALLY, WHETHER COURTS CAN SILENTLY AFFIRM A PETITIONER'S CONVICTION ON THE MERITS WHERE THERE WAS NO MENTION OF PETITIONER'S CONSTITUTIONAL CLAIM AND THE RECORD PROVIDES SIGNIFICANT EVIDENCE OF A VIOLATION OF THIS SPECIFIC CONSTITUTIONAL RIGHT.

The Florida Courts continue to ignore or disregard the decisions of this Court in "Crawford" and it's progeny.

Petitioner clearly and concisely presented to the Florida District Court of Appeal two claims pointing to numerous instances where the prosecutor intentionally used the testimonial statements of a witness, not listed on the State's witness list, nor in Court to testify to the testimonial hearsay statements provided to the jury by the prosecutor to prove the truth of the matter asserted.

The Florida District Court's three word denial "Denied on Merits" is not explicit with regard to it's legal conclusions and factual determinations. In light of the record presented, Petitioner's case facts fall squarely within the decisional law of this Court in Crawford and it's progeny because every statement provided by Michelle Dotson, the non-testifying witness, to law enforcement and intentionally used by the prosecutor as hearsay, qualify as testimonial and Petitioner had an absolute right to cross examine this witness about those statements as well as the physical evidence, 'a Mickey Mouse Pin' that the prosecutor introduced into evidence and falsely stated to the jury that Petitioner provided this Mickey Mouse

Pin to Michelle Dotson and that this evidence alone is sufficient to convict Petitioner of Dealing in Stolen Property.

Because the State remained silent in it's response to these claims it is reasonable to assume that the Florida District Court of Appeals adopted the State's arguments and rationale to deny habeas relief.

The statements of Michelle Dotson that were intentionally used by prosecutor for qualify as testimonial because:

1. The purpose of Michelle Dotson's involvement and continued cooperation with law enforcement began as a Crime Stopper's Tipster and her decision to continue to provide assistance was to assist law enforcement in gathering incriminating evidence against Petitioner to prove past events relevant to future prosecution and:

2. Michelle Dotson provided law enforcement detailed statements implicating Mr. DePriest, (Petitioner) of an alleged crime and provided law enforcement with physical, tangible evidence (a Mickey Mouse Pin) alleging Mr. DePriest's involvement in her possession of it; evidence that was ultimately introduced as evidence against Mr. DePriest and was the sole piece of physical evidence presented linking Petitioner of the alleged crime of Dealing in Stolen Property.

3. Ms. Dotson's statements on the tape recorded 'Controlled' phone call were 'testimonial' because Ms. Dotson's questions were provided to her from law enforcement from facts and evidence collected through their investigation which provided the 'background' substance with which the jury would hear to reach their verdict. Each question was posed by Ms. Dotson based upon information collected by Detective Rose and Patterson through their investigation and they were testimonial because the questions were posed in such a way as to inculpate the Petitioner with alleged involvement in a criminal episode. The Petitioner's

responses to these questions were largely inaudible and unintelligible but the prosecutor provided responses of the Petitioner through opinion and testimonial hearsay statements that were provided to him from both law enforcement and Ms. Dotson.

4. Defense Counsel lacked any opportunity to cross-examine Ms. Dotson prior to or during jury trial.

5. There was no on-going emergency and all of Ms. Dotson's statements were made under circumstances objectively indicating their primary purpose was to assist law enforcement to prove past events that were potentially relevant to future prosecution.

Had the Court's applied Crawford and it's progeny correctly, they would have been obligated to conclude that Ms. Dotson's statements were inherently testimonial and without having Ms. Dotson listed as a witness and present in court to testify to the alleged facts supplied by the prosecutor it is without a doubt that the prosecutor became a witness for the State by his continuous use of testimonial hearsay statements.

VI. CONCLUSION

Because the Florida Court and the Federal Courts failed to address this specific claim as presented and rule upon it's merits Petitioner's Habeas Corpus rights were suspended and the Sixth Amendment Confrontation Clause Claim remains unaddressed and this court should grant *Certiorari* to address and rule upon Petitioner's Constitutional Sixth Amendment Claim.

WHEREFORE, for the reasons set forth above, Petitioner Jon Duke DePriest, prays that this Court grant his Petition for a Writ of *Certiorari* and order further briefings or vacate and remand this case to the Florida District Court of Appeals or the appropriate court with instructions to specifically rule upon the merits of Petitioner's Sixth Amendment Claim in violation of the Confrontation

Clause and this Court's

decisions in Crawford and its progeny.

Dated: June , 2018.

Respectfully submitted,

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