ORIGINAL

No: 19-7920

In the
Supreme Court of the United States

IVERYLEE JOHNSON,

Petitioner,

vs.

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Iverylee Johnson
DOC # C09282
Walton C.I.
691 Institution Road
DeFuniak Springs, Fl 32433-1831

QUESTIONS PRESENTED FOR REVIEW

Was Johnson's due process and Sixth Amendment confrontation clause protections violated by allowing Powell's unsworn testimony to be presented to the jury for consideration in their deliberations in violation of this Court's precedent and the Fifth and Sixth Amendment?

Was the permitting unsworn testimony at Johnson's trial, an unreasonable application of clearly established federal law as determined by this Court.

Was this Court's landmark *Strickland v. Washington*, 466 U.S. 688 (1984) decision violated by the State Court's decision?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case. The United States Court of Appeal for the Eleventh Circuit, and the United States District Court for the Middle District of Florida.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

No:

In the
Supreme Court of the United States

IVERYLEE JOHNSON,

Petitioner,

vs.

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Iverylee Johnson, the Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled cause.

OPINION BELOW

The denial of Johnson's motion for reconsideration on the opinion of the Court of Appeals for the Eleventh Circuit (Prior, W. and Rosenbaum) denying the request for a certificate of appealability is an unpublished opinion in *Johnson v. Secretary, DOC, Att'y General State Florida,* Docket No: 19-11228 (December 11, 2019) is reprinted as Appendix A to this petition.

The denial of Johnson's motion for a certificate of appealability in the Court of Appeals for the Eleventh Circuit (Prior, W.) is an unpublished opinion in *Johnson v. Secretary, DOC, Att'y General State Florida,* Docket No: 19-11228 (October 18, 2019) is reprinted as Appendix B to this petition.

The denial of Johnson's motion for reconsideration in the United States District Court (Mendoza, C.) denying Johnson's motion for reconsideration on the order entered denying the Title 28 U.S.C. § 2254 in *Johnson v. Secretary, DOC, Att'y General State Florida,* Docket No: 6:17cv1630-Orl-41DCI (March 27, 2019), is reprinted as Appendix C to this petition.

The denial of Johnson's Title 28 U.S.C. § 2254 in the United States District Court (Mendoza, C.) in *Johnson v. Secretary, DOC, Att'y General State Florida,* Docket No: 6:17cv1630-Orl-41DCI (March 1, 2019), is reprinted as Appendix D to this petition.

STATEMENT OF JURISDICTION

The Eleventh Circuit's denial of Johnson's Title 28 U.S.C. 2254 and appeals thereof was entered on December 11, 2019. The Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. Fifht Amendment U.S. Constitution.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. Sixth Amendment U.S. Constitution.

Title 28 U.S.C. § 2254 provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to

an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS § 2254].

Id. Title 28 U.S.C. § 2254.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On November 29, 2012, Johnson was arrested and charged with Robbery with a Firearm, Florida Statute § 812.13(2)(a) and aggravated Assault with a Weapon § 784.021. The State also filed a notice of intent to prosecute Johnson as a Prison Release Re-Offender (PRR). This statute required the State court to impose a life sentence if Johnson was convicted at trial. After a 4-day trial, the jury returned a

verdict of guilty on all counts and on October 1, 2014, the State court sentenced Johnson to life incarceration as mandated by F.S. § 775.082.

A State appeal was sought, however, on May 12, 2015, the Fifth District Court of Appeals affirmed via a *per curiam* unpublished decision. *Johnson v. State*, 166 So. 3d 807 (Fla. Dist. Ct. App. 2015). Johnson then filed a timely motion to vacate sentence and conviction pursuant to Fla. R. Crim. P. 3.850. The State Court denied Johnson's motion without a hearing. Johnson, through counsel, filed a motion for rehearing pursuant to 3.850(j). That pleading was never addressed. An appeal followed and on July 11, 2017, the Fifth District Court of Appeals affirmed. *Johnson v. State,* No. 5D17-412, 2017 Fla. App. LEXIS 10188 (Dist. Ct. App. July 11, 2017). Rehearing and *rehearing en-banc* were also denied. *Johnson v. State,* 228 So. 3d 577 (Fla. Dist. Ct. App. 2017).

B. Summary of the Facts

Shortly before 6:30 a.m. on November 29, 2012, two unknown men wearing ski masks and gloves entered the Kangaroo Express convenience store on the north side of West Route 436 at the corner of Spring Oaks Boulevard in Altamonte Springs, Florida. (T. 195).[1] One of the unknown individuals wore a black hooded sweatshirt and dark pants and possessed a firearm. The other unknown Defendant

[1] "T" refers to the trial transcript page filed in index in the USDC Middle District of Florida, *Johnson v. Secretary, DOC, Att'y General State Florida,* Docket No: 6:17cv1630-Orl-41DCI.

wore a camouflage colored jacket. Both individuals wore ski masks and gloves. (T. 112, 153). Mrs. Pollack was the Clerk working behind the counter at the store when the robbery occurred. One individual jumped behind the counter and took a till box out of the cash drawer along with Pollack's purse. (T. 115, 156, 157). The till contained some bills, nickels, dimes and quarters. (T. 111, 135). Pollack's purse contained $1,500.00, a ring, her wallet, and some Camel cigarette coupons. (T. 116, 118, 132). Both individuals then fled. Unknown to them, another employee sneaked out of the store and dialed 911 on his cell phone. (T. 120, 159). The Police soon converged in the area along with a canine tracking team and a helicopter.

Officers set up a perimeter after observing a male run into a wooded area. (T. 208, 216, 234, 259-260). A deputy and his bloodhound were assigned to track the individual's whereabouts. The bloodhound took a scent and tracked to a chain-link fence in the area where the deputy found a discarded black hoodie, black t-shirt, boots, and socks. It was unknown who discarded these items. (T. 272, 285-286, 294). The deputy conducted a "man track" without his bloodhound. After he passed through the fence, he spotted what appeared to be fresh toe marks and the evidence of some crawling. (T. 277, 279). He recognized an individual in the sand and with the assistance of another deputy apprehended Johnson. Approximately one hour later, another canine tracking team arrested Demarius Powell ("Powell). Inside Powell's jacket, they found two black ski masks and black fabric gloves. It

is unknown who the second ski mask belonged to. After a search subsequent to the arrests, the officers located $1,400.00 in cash (which contained $ 8.00 in loose change), two disposable cigarette lighters and a Camel cigarette coupon. A few days later, Altamonte Springs Police Officers searched the same area and found Pollock's purse, wallet, and cigarette coupons. The officer's also found two black fabric gloves. (T. 333-334, 337, 364). Four days later, a money till box and a firearm were located. (T. 211, 212-213, 352). The firearm was not reported stolen and the defense made to attempt to contact the firearm's registered owner.

Due to an oversight, the State's star witness Powell was not sworn as required under Florida Statute § 90.605 and testified for the State as an unsworn witness. The unsworn testimony detailed how he committed the robbery, that Johnson was the other individual involved in the robbery, and how he and Johnson ran into the woods where they were apprehended. (Tr. 149, 150) Neither defense counsel nor the State objected to the unsworn testimony.

Johnson, on the other hand, testified he came to Florida to visit a friend he met on Facebook. (T. 655-656). A friend, Ernest Fuller, drove them along Route 436 since Fuller was going to visit the young girl as well. (T. 652). On the way back from Fuller's apartment, Powell and Kyle (another friend in the vehicle), talked about "hitting a lick," meaning to commit a crime. (T. 654). Powell was adamant so Johnson when Fuller stopped the vehicle he stepped out. Powell and Kyle ran

out of the car into the convenience store. (T. 656). As Johnson walked towards Interstate 4, heard sirens and so he turned around and started walking west. (T. 655). Meanwhile, Fuller (driving Johnson's rental car), drove off at the sound of the sirens leaving Johnson stranded. (T. 659). Johnson, who had smoked marijuana earlier in the day, saw a female officer with an assault rifle running towards him so he ran into the woods where he discarded his clothes and concealed himself. (T. 661-662). After booking at the Police Station, Johnson talked with Powell who told him that he and Kyle had robbed the Kangaroo Convenience store. (T. 665). Johnson was convicted on Powell's unsworn testimony.

REASONS FOR GRANTING THE WRIT

This court should issue a writ of certiorari because the United States Court of Appeals for the Eleventh Circuit has interpreted federal statutes in a way that conflicts with applicable decisions of this court

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons, therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal

> question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a ... United States court of appeals has decided an important question of federal law which has not been but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

1. Was Johnson's due process and Sixth Amendment confrontation clause protections violated by allowing Powell's unsworn testimony to be presented to the jury for consideration in their deliberations in violation of this Court's precedent and the Fifth and Sixth Amendment.

Iverylee Johnson will die in jail after being convicted on unsworn testimony of a government's cooperating witness. Whether this was an oversight or not, due process requires this Court's intervention. The lawful jury verdict, cannot stand if obtained by unlawful means. *Hellman v. Weisberg*, 2007 U.S. Dist. LEXIS 89174, at *26 (D. Ariz. Dec. 3, 2007); *United States v. Nelson*, 712 F.3d 498 (11th Cir. 2013) ("A lawful end does not justify an unlawful means.")

This court has made it clear that a fundamental principle of the American Judicial System is that every accused ***shall only be convicted*** on the presentation of sworn testimony. *Crawford v. Washington*, 541 U.S. 36 (2004). This right, fundamental or otherwise, was disregarded in Johnson's case. The state judge imposed a life sentence after Johnson was convicted via unsworn testimony by the

State's main cooperating witness Powell. The State prosecutors and the State Court acknowledgment Powell presented unsworn testimony through an "inadvertence." (Rule 3.850, Order p.3) However, what the State Court considered an "inadvertence" was actually a violation of Johnson's Sixth Amendment Confrontation Clause. The jury relied upon, deliberated and returned a verdict of guilt relying on the unsworn testimony. The State of Florida has enacted statute § 90.605 mandating that each witness must take an oath prior testifying at a trial.[2] Without an oath, a witness is considered "incompetent to testify." *Houck v. State*, 421 So. 2d 1113 (Fla. Dist. Ct. App. 1982) (an unsworn witness is incompetent to testify.) A jury cannot rely on an incompetent witness to return a verdict. *Id.* at 1114 (Fla. Dist. Ct. App. 1982).

Powell confessed he committed the robbery, jumped over the counter, took the Clerk's purse and the till box. (T. 111, 135). His testimony crucial to the State's case since he "picked up the mask" containing Johnson's DNA. (T. 112, 153). The mask was critical since it placed Johnson's DNA at the scene. Since both unknown defendants wore masks, no other witness was able to place Johnson at the robbery. Neither could the State prove that Johnson was in possession of a firearm during the robbery. In essence, Powell was the State's star witness. Permitting Powell, who at this stage is considered an "incompetent witness" since

[2] The Statute provides an exception for young children. *See,* F.S. § 90.605(2).

he was not sworn to present testimony to the jury, strikes at the heart of the confrontation clause. This action has been explicitly prohibited by this Court in *Crawford v. Washington*, 541 U.S. 36 (2004).

A due process violation occurs when unsworn testimony is permitted to proceed to a jury verdict. *Maryland v. Craig*, 497 U.S. 836, 845-46, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (The right guaranteed by the Confrontation Clause includes not only a "personal examination but also '(1) *ensures that the witness will give his statements under oath - thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;* (2) forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility'" (quoting *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) and citing *Mattox v. United States*, 156 U.S. 237, 242, 15 S. Ct. 337, 39 L. Ed. 409 (1895)). Although, there is no constitutionally required form of oath, *Moore v. United States*, 348 U.S. 966, 75 S. Ct. 530, 99 L. Ed. 753 (1955) the witness must, *at a minimum*, give a statement conveying that he or she is "impressed with the duty to tell the truth and understands that he or she can be prosecuted for perjury." *Id.* This long-standing precedent was called an "inadvertence" in Johnson's trial. An "inadvertence"

cannot override Sixth Amendment protections. Even "inconsistent statements" have been rejected as substantive proof of guilt since it would allow a defendant to be convicted on unsworn testimony. *Bridges v. Wixon*, 326 U.S. 135, 153-54 (1945) (criticizing the substantive use of inconsistent statements as substantive proof because '[s]o to hold would allow men to be convicted on un-sworn testimony of witnesses, a practice which runs counter to the notions of fairness on which our legal system is founded.")

This Court in its list of infractions that violate fundamental fairness limited the violations to those guarantees enumerated in the bill of rights. The Sixth Amendment confrontation clause was on that list. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (Sixth Amendment Confrontation Clause). Thus in order for Johnson to establish his due process violation, he must establish that a confrontation clause violation occurred in the first place. A Sixth Amendment violation occurs when an oath is not provided to a witness accusing a defendant of a crime. *Maryland v. Craig*, 497 U.S. 836, 847, 110 S. Ct. 3157, 3164 (1990). In fact, in *Crawford,* this Court was explicit that there was no room in the criminal justice system for "unsworn testimony during a criminal trial." *Id.* at 52. (The claim that unsworn testimony was self-regulating because juries would disbelieve it, cf. post at n.1, 158 L.Ed. 2d at 204, is belied by the very existence of a general bar on unsworn testimony.) *Id.* 52 n.3. Even prior

to Crawford, this Court in *Maryland v. Craig*, 497 U.S. 836 (1990) reiterated that the "right guaranteed by Confrontation Clause includes not only a 'personal examination but also (1) ensure[d] that the witness will give his statements under oath...."

In this case, the State court reasoned that in light of *Griffin v. Harrington*, 915 F. Supp. 2d 1091, 1112 (C.D. Cal. 2012) a defendant may waive the right to the presentment of sworn testimony. In *Griffin*, unsworn testimony was presented to the jury for guilt determination. *Griffin* argued in his state post-conviction petition that trial counsel was ineffective by failing to object to the introduction of the unsworn testimony during the trial. *Id.* at 1095. The State appellate court affirmed reasoning that "[Griffin] waived his confrontation right by failing to object at trial." *Id.* at 1095. On appeal in his federal habeas petition, the court concluded that *Griffin's* "trial counsel's failure to object to [the witnesses'] unsworn testimony was neither objectively reasonable nor the result of the reasoned trial strategy." Id. at 1112. *Griffin* had demonstrated prejudice sufficient to call into question the outcome of the trial. Id. 1112. No waiver existed in this case. Counsel just failed to react. In fact, the State prosecutor considered the violation an "inadvertence" not a purposeful waiver nor any trial strategy attributable to counsel. Johnson never waived his right to permit Powell to present unsworn testimony. On the contrary, Johnson always argued that his trial attorneys were ineffective by allowing the jury

to rely on the unsworn testimony to convict him. Absent a deliberate waiver, the State court could not conclude that any trial strategy was sought. See, *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770 (2011) ("*Strickland* [] calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.") Trial counsel's failure to object strikes at the heart of Johnson's ineffectiveness allegations.

The prejudice to Johnson was evident. The jury relied on Powell's testimony to convict him which led to a life sentence. Powell was testifying without taking an oath so that Powell would know his false testimony carried repercussions. Especially in light of the fact that Powell had already received a substantial sentence reduction for his cooperation that would have been revoked if he testified untruthfully. Powell, in essence, was provided the proverbial, "nothing to lose" option. He was allowed the utmost freedom to testify as he saw fit, placing himself in the best light for the prosecution knowing very well that his testimony, even if untruthful, could have no repercussions whatsoever on his sentence. The violation was evident, strikes at the heart of this Court's *Crawford* decision and warrants a reversal of Johnson's conviction.

2. Was the permitting unsworn testimony at Johnson's trial, an unreasonable application of clearly established federal law as determined by this Court.

Florida statute provides in relevant part:

(1) Before testifying, each witness shall declare that he or she will testify truthfully, by taking an oath or affirmation in substantially the following form:

"Do you swear or affirm that the evidence you are about to give will be the truth, the whole truth, and nothing but the truth?" The witness's answer shall be noted in the record.

(2) In the court's discretion, *a child* may testify without taking the oath if the court determines the child understands the duty to tell the truth or the duty not to lie.

Id. F.S. § 90.605

The error in allowing Powell's testimony to proceed unsworn did not only violate Johnson's due process rights but also Fla. Stat. § 90.605. This Court's *plain error* standard was met. *United States v. Olano,* 507 U.S. 725, 113 S. Ct. 1770 (1993); *Toiberman v. Tisera*, 998 So. 2d 4, 5 (Fla. Dist. Ct. App. 2008) (Fundamental or *plain error* is not waived simply because the parties and the trial court ignored a clear statutory prohibition. Fundamental error, which can be considered on appeal without objection in the lower court, is an error that strikes at the foundation of the case or goes to the merits of the cause of action). See, *Sanford v. Rubin*, 237 So. 2d 134 (Fla. 1970) (Finding that fundamental error may be raised for the first time on appeal.) A § 90.605 can be considered a fundamental error since it goes to the foundation of the witnesses' testimony. The only witness

whose testimony could not be corroborated by any other witness was Powell's. His testimony was unique and critical to the state. See, *Woodfin v. State*, 553 So. 2d 1355 (Fla. Dist. Ct. App. 1989) (no fundamental error due to *other* corroborating testimony). Fla. Stat. § 90.605 requires that ***each witness take the oath before testifying*** except for young children. There is no exception to this rule. Even attorneys, as officers of the court that are subject to disciplinary action for deceiving judges by a false statement, are not exempt from Fla. Stat. § 90.605's requirements. *Murphy v. State*, 667 So. 2d 375, 1995 Fla. App. LEXIS 12952 (Fla. 1st DCA 1995).

By permitting Powell to testify unsworn, via an "inadvertence" or otherwise was an error. The State appellate court's decision was an unreasonable application of the clearly established federal law in light of *Crawford,* as determined by this Court and an unreasonable application of Florida Statute § 90.605.

3. Was this Court's landmark *Strickland v. Washington*, 466 U.S. 688 (1984) decision violated by the State Court's decision.

Johnson was charged that he used a firearm to commit a robbery at a convenience store on November 29, 2012. The state's theory was that a firearm, located several days after the robbery, was possessed by Johnson. The firearm was never reported lost, stolen or missing. It was unknown if the firearm's owner (Timothy Murphy) was in possession of the firearm on the day of the robbery. Although Murphy was known to defense counsels, they never questioned,

investigated, nor deposed him. (Tr. p. 386) Powell's unsworn testimony was critical in placing the firearm at the scene of the robbery. The firearm's owner (Murphy) was a critical defense witness. There are unanswered questions as to how Murphy's firearm was allegedly used in the robbery, especially when it was never reported stolen nor missing.

Johnson argued that trial counsels were ineffective by not investigating nor talking with Murphy. Murphy, who lived in St. Petersburg, Florida could have easily been interviewed and could have provided an alternate theory for the defense. There are questions as to whether Murphy lost his firearm in the field, whether he knew the other defendant or whether his firearm was lost months earlier. All these possibilities could have been used by the defense to discredit the State's theory. In fact, the defense's theory was that Kyle and Powell, who were friends for years, jumped out of the car and committed the robbery. (Tr. p.189, 190, 656, 668, 702) Murphy could have shed some light on Kyle's involvement in the offense. The failure to call Murphy, who quite possibly knew Kyle, constituted ineffective assistance of counsel. See, *Rockett v. Sec'y, Dep't of Corr.*, No. 8:08-cv-1417-T-23EAJ, 2014 U.S. Dist. LEXIS 105466, at *36 (M.D. Fla. Aug. 1, 2014)(quoting, *Tyler v. State*, 793 So.2d 137, 141 (Fla. 2d DCA 2001) (noting allegation, if true, that uncalled witness would provide exculpatory version of events is sufficient to show prejudice); *Devaney v. State*, 864 So.2d 85, 88 (1st

DCA 2003) (stating that counsel's failure to call a witness who could have cast doubt on the defendant's guilt constitutes ineffective assistance).

The state court in denying the Rule 3.850 petition reasoned that since counsel listed Johnson as the only defense witness, now Johnson could not complain about the trial counsel's actions. This reasoning is flawed. The Court blamed Johnson for not calling the witness, although, Johnson was represented by counsel during the trial. Johnson could not be faulted for failing to raise a defense at trial for which he does not know about. Powell did not become aware of this witness until after trial when he reviewed the trial counsel's notes in preparation for his state Rule 3.850 petition.

Failing to interview, depose or subpoena the owner of the firearm, which could have possibly led the Defense to conclude that Murphy knows Kyle or possibly is the same individual and actual robber, caused counsels actions to reach the level of ineffectiveness as explained in *Strickland*. If the state court's reasoning would be followed, then no defendant nationwide could ever be successful on ineffective assistance of counsel claims. Johnson relied on his defense attorneys to interview all defense witnesses and prepare zealously for his defense. See, *Kimmelman v. Morrison,* 477 U.S. 365, 385-387 (1986) ("a single, serious error may support a claim of ineffective assistance of counsel." *Id. Kimmelman* at 384. A single serious error" could cause counsel's performance to fall "below the level of

reasonable professional assistance" even where, "counsel's performance at trial was "generally credible enough" and even where counsel had made "vigorous cross-examination, attempts to discredit witnesses, and [an] effort to establish a different version of the facts." *Id.* 477 U.S. at 386. *Murray v. Carrier*, 477 U.S. 478, 496, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986) ("The right to effective assistance of counsel ... may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial.")

As such, this court must agree that Johnson's counsels were ineffective in light of *Strickland*. The state appellate court's decision was an unreasonable application of clearly established federal law as determined by this Court.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand order the Court of Appeals for the Eleventh Circuit.

Done this 10, day of March 2020

Respectfully submitted,

Iverylee Johnson
DOC # C09282
Walton C.I.
691 Institution Road
DeFuniak Springs, Florida 32433-1831