

No. _____

In The
Supreme Court of the United States

CARLOS JOHNSON,

Petitioner,

v.

DAN REDDINGTON, Warden,
Northeast Correctional Center,

Respondent.

**On Petition For A Writ Of Certiorari To the
Supreme Court of Missouri**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner Carlos Johnson is serving a fifteen-year Missouri state court sentence for the unlawful use of a weapon. Mr. Johnson entered a guilty plea to the offense and was initially placed on probation. After a probation revocation hearing in which the circuit court allowed, among other hearsay evidence, the video taped deposition of the state's main witness who was available to testify, it revoked Mr. Johnson's parole and executed his fifteen-year sentence. Under Missouri law, when seeking to challenge the revocation of probation, a defendant must seek habeas relief. The state circuit court, court of appeals, and Missouri Supreme Court each denied Mr. Johnson habeas relief.

The question presented is:

To guarantee fairness, should criminal defendants in probation revocation proceedings be provided under the due process clause with a more robust right to confrontation that is similar to that provided in criminal prosecutions under *Crawford v. Washington*, 541 U.S. 36 (2004)?

LIST OF PARTIES

All parties appear in the case caption on the cover page of this petition.

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In The
Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner Carlos Johnson respectfully prays that a Writ of Certiorari issue to review the judgment of the Missouri Supreme Court entered in this case.

OPINIONS BELOW

The final judgment and mandate by the Missouri Supreme Court on March 1, 2022, denying Petitioner's habeas petition is attached as Appendix A. The order of the Missouri Court of Appeals, Eastern District, denying Petitioner's state habeas petition on December 3, 2021, is attached as Appendix B. The March 17, 2021, judgment of the 33rd Judicial Circuit (St. Francois County, Missouri) denying Petitioner's petition for writ of habeas corpus is attached as Appendix C.

JURISDICTION

The Missouri Supreme Court issued its denial of Petitioner's petition for writ of habeas corpus on March 1, 2022, and that ruling became final on that date. This Court has jurisdiction under 28 U.S.C. § 1257 to review this Petition. This petition, postmarked May 31, 2022, is timely filed pursuant to SUP. CT. R. 13.3.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

I. Procedural Background

On April 9, 2015, Mr. Johnson entered a guilty plea in the St. Louis City Circuit Court to the Class C felony of unlawful use of a weapon. See State v. Johnson, No. 1522-CR01006-01. On June 26, 2015, the plea court sentenced him to fifteen years in prison. *Id.* The trial court, however, suspended execution of Mr. Johnson's sentence and placed him on five-years' probation. *Id.*

On November 15, 2015, the St. Louis County Prosecuting Attorney filed a complaint charging Mr. Johnson with second degree murder, armed criminal action, and the unlawful possession of a firearm in State v. Johnson, No. 15SL-CR07558-01. On January 25, 2016, the St. Louis City Circuit Court issued a "probation capias warrant" for Mr. Johnson's arrest alleging that he violated "Probation Condition: No. 1 (Laws)." Also, the court suspended his probation. On October 20, 2017, the state took the video deposition of William Newsome - the

state's only alleged eyewitness - after getting a court order to do so. Subsequently, the state filed a notice of probation violation and requested that Mr. Johnson's term of probation be revoked based on the St. Louis County charges filed on November 15, 2015. On December 15, 2017, the state filed a motion requesting that the St. Louis Circuit Court to revoke his probation and execute his suspended sentence.

On February 20, 2018, a probation revocation hearing was held before the state circuit court. Although appointed counsel requested that the hearing be delayed pending the outcome of *State v. Johnson*, No. 15SL-CR07558-01, the court proceeded with the hearing and revoked Mr. Johnson's probation because Mr. Johnson had been "around" a weapon in connection with the St. Louis County criminal case 15SL-CR07558-01.

On March 20, 2018, the state entered a nolle prosequi in St. Louis County criminal case 15SL-CR07558-01, based on the unreliable testimony of Mr. Newsome. Afterwards, the state refiled charges against Mr. Johnson in St. Louis County criminal case No. 18SL-CR03398-0. During the pendency of this criminal case, Mr. Johnson's investigator contacted Mr. Newsome to inform him of his responsibility to appear at trial. Mr. Newsome informed the investigator that he was coerced into implicating Mr. Johnson. On June 28, 2019, after a jury

trial, Mr. Johnson was acquitted of all counts.

II. Probation Revocation Proceedings

At Mr. Johnson's probation revocation hearing, the circuit court, over the written and oral objections of counsel, allowed the state to introduce as evidence: (1) the testimony of a St. Louis County assistant prosecuting attorney; (2) the double hearsay testimony of William Newsome via video deposition; and (3) and the hearsay statements of third parties in recorded jailhouse telephone.

During the hearing, the state gave no justification or evidence whatsoever for not producing Mr. Newsome. Although the St. Louis County assistant prosecutor suggested that Mr. Newsome was in federal custody and outside the state's subpoena power, he was incarcerated in the Missouri Department of Corrections at the Boonville Correctional Center in Boonville, Missouri during the time period over which the hearing was held, and could have been produced by a writ of habeas corpus ad testificandum. The state was aware of this but failed to present any evidence that Mr. Newsome was unavailable. In fact, the St. Louis County assistant prosecutor filed a writ in Mr. Johnson's pending criminal case one week later seeking to have Mr. Newsom brought in for the St. Louis County criminal trial. At the revocation hearing, the assistant prosecutor indicated that she had not inquired as to Mr. Newsome's availability.

At the revocation hearing, the circuit court emphasized that Mr. Newsome's deposition was taped with the intention that it be used at Mr. Johnson's criminal trial, and that the circuit court believed that the process followed in connection with such taping was sound. The deposition, however, was not taken for the purpose of Mr. Johnson's revocation hearing, and Mr. Newsome was available for that hearing. Although Mr. Johnson knew Mr. Newsome's testimony was false, neither himself nor the counsel who represented him at his revocation hearing were in the possession of the actual evidence to prove this. Ultimately, his criminal defense attorney was able to obtain irrefutable evidence of Mr. Newsome's untruthfulness. Unfortunately by that time, the court had revoked his probation without giving him the chance to produce such evidence.

After Mr. Johnson's probation was revoked, the state would nolle prosequi the charges against Mr. Johnson and then reissue them. During the pendency of Cause No. 18SL-CR03398-01, an investigator for the public defender who was representing Mr. Johnson, contacted Mr. Newsome to inform him of his duties to appear in court. Mr. Newsome informed the investigator, he did not wish to appear and that the only reason he implicated Mr. Johnson in Cause No. 18SL-CR03398-01, is that he had been coerced and indirectly threatened by the state that he could be charged in the case and for other offenses. Furthermore, the

assistant prosecutor contacted Mr. Johnson's defense attorney in the St. Louis County case, alluding to the pressure she had put on Mr. Newsome to testify:

Megan,

I just received a package in my mail from your investigator memorializing the conversations with Mr. Newsome. Do you plan on asking him questions regarding the "pressure" I put on him to testify? If that is the case, I need to see if his attorney is available to come to the hearing next Fri. Please advise. Also, do you have the actual recording?

KK.

Mr. Newsom ultimately gave two depositions regarding Mr. Johnson's prosecution, and in both his depositions, he claimed he witnessed the shooting Mr. Johnson was charged with. Specifically, that the shooter and the victim were facing each other and it appeared that the victim had been shot in the stomach and chest area. This account of the shooting is refuted by the post-mortem examination performed on the victim which indicates that all entry wounds of the victim were in the back. Furthermore, Mr. Newsome had admitted that Mr. Johnson had nothing to do with the shooting and that his allegations were false.

Mr. Newsome: The affidavit would state that all statements prior to me writing this affidavit was false. They were coerced. And that I was pressured into saying what I said. And I really don't know what happened.

Also, Mr. Newsome testified that he knew one of the witnesses to shooting

because he had been incarcerated with him but this was not true as Missouri Department of Corrections records demonstrate they had never been incarcerated together.

Also, the probation officer that initiated the alleged violations against Mr. Johnson did not testify at the revocation hearing. The court made no finding of good cause for admitting the hearsay testimony of Mr. Newsome or not producing the probation officer. It is unclear how the circuit court could have made a finding to revoke Mr. Johnson's probation without the presence of the probation officer who initiated the proceedings to revoke his probation. Again, the circuit court made no finding of good cause for admitting the aforementioned hearsay testimony or for not producing the probation officer. This is not refuted by the record.

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT TO DECIDE THE EXTENT OF A CRIMINAL DEFENDANT'S RIGHT TO CONFRONTATION IN PROBATION REVOCATION PROCEEDINGS TO GUARANTEE FAIRNESS.

In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), this Court set out what process is due at a probation violation hearing. This Court held that before probation is revoked, a probationer is entitled to, among other things, "the right to confront and

cross examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).” *Id.* at 786. Courts, however, have routinely held that the Sixth Amendment’s Confrontation Clause as enunciated in *Crawford v. Washington*, 541 U.S. 36 (2004) does not apply to revocation proceedings. *See e.g. Diaz v. State*, 172 S.W.3d 668, 669-670 (Tex. App. 2005) (citing state and federal authority). The confrontation right discussed in *Gagnon* is not a Sixth Amendment right, but instead a matter of due process under the Fourteenth Amendment. Due process confrontation is more flexible than its Sixth Amendment cousin. It’s not, as this Court called the Sixth Amendment in *Crawford*, a procedural “guarantee.” Rather, it’s rooted in notions of “fairness,” and a court may deny confrontation if it has a sufficiently “good cause”—something that would not be true if *Crawford* controlled. This Court noted in *Gagnon* that “[w]hile in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not . . . intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence.” *Gagnon*, however, predates *Crawford* by some three decades. Given that this Court has not issued a major decision regarding the due process right to confrontation since its 1970’s opinions in *Gagnon* and *Morrissey v. Brewer*, 408 U.S. 471 (1972), it is time for this Court

to again review what due protections should be afforded a defendant facing the revocation of their probation in light of this Court's confrontation jurisprudence after *Crawford*.

In the years since *Gagnon* and *Morrissey* this Court has issued numerous opinions regarding the Sixth Amendment right to confrontation. The most significant of these is *Crawford*. Under *Crawford*, the Confrontation Clause bars prosecutors from introducing out-of-court testimonial statements into evidence against a defendant unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. 541 U.S. at 58. In Mr. Johnson's case, the main witness against him, Mr. Newsome, did not testify at his probation revocation hearing. The court allowed his testimony to be introduced by a video deposition. The video, however, had not been prepared for the hearing. Also, Mr. Newsom was available to testify and the state could have had the court to issue a writ to bring him in to testify. Given the subsequent criminal proceedings against Mr. Johnson that demonstrated Mr. Newsome's inherent unreliability as a witness, it is fair to say that his probation would not have been revoked but for the video-taped testimony. Under the Sixth Amendment this would have been a clear violation of Mr. Johnson's rights because the only why to test its reliability would be through cross-examination. *Crawford*, 541 U.S. at 61.

In Mr. Johnson's case the reliability of Mr. Newsome was determined by the court. This approach adopts the overruled concept from *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. at 36, that hearsay evidence determined to have sufficient indicia of reliability does not require confrontation. Similarly, the probation officer who filed the probation violation report did not testify at the revocation hearing. The court made no finding that he was unavailable, let alone a finding that his testimony was reliable. Under *Crawford*, the violations claim in the probation violation report would not have been admissible without its author's testimony.

Mr. Johnson's case presents this Court with the opportunity to revisit what due protections in the context of confrontation that a defendant facing revocation is entitled to. Because probation violation jurisprudence had not kept up with the changes that have occurred in the interpretation of the Sixth Amendment Right to Confrontation, this Court should grant Mr. Johnson' certiorari petition.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari and issue a writ of certiorari to review the decision of the Missouri Supreme Court.

Respectfully submitted,

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May 31, 2022

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