S269237

Court of Appeal No. No. B302236

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	No.
Plaintiff and Respondent,	)	
	)	
v.	)	
	)	
DONTRAE GRAY,	)	
	)	
Defendant and Appellant.	)	
	)	

PETITION FOR REVIEW

Petition for Review of Appellant
After a Decision by the Court of Appeal
Second Appellate District, Division Two
Filed April 30, 2021

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	)
Defendant and Appellant.	)
	)

PETITION FOR REVIEW

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA

Defendant and appellant, DONTRAE GRAY, by and through counsel, hereby petitions for review, pursuant to California Rules of Court, rules 8.500 and 8.504, the published decision of the Court of Appeal for the Second Appellate District, Division Two, filed on April 30, 2021.[1] A copy of the opinion is attached to this petition as an appendix.

[1] The opinion's official citation is *People v. Gray* (2021) 63 Cal.App.5th 947.

ISSUE PRESENTED FOR REVIEW

At a probation violation hearing, does the admissibility of a hearsay statement that qualifies as an excited utterance under Evidence Code section 1240, automatically satisfy a defendant's due process right of confrontation, or is a further showing of good cause and a finding that a balancing of factors favor admission also required under the Due Process Clause of the Fourteenth Amendment?

WHY REVIEW SHOULD BE GRANTED

Review should be granted to resolve a conflict between the decisions of the appellate courts of this state on the issue of whether hearsay statements that qualify under the spontaneous utterance exception (Evid. Code, § 1240), are automatically admissible at a probation revocation hearing, or whether a defendant's due process right of confrontation requires a showing of the declarant's unavailability or other good cause to present the hearsay statements in lieu of live testimony.

In *People v. Winson* (1981) 29 Cal.3d 711, this Court held that, at a probation revocation hearing, the prosecution may not introduce the transcript of a witness's preliminary hearing testimony in lieu of the witnesses' live testimony "in the absence of the declarant's unavailability or other good cause." (*Id*. at pp. 713-714.)

In *People v. Arreola* (1994) 7 Cal.4th 1144, 1157-1158, this Court held that the introduction of a preliminary hearing transcript at a probation violation hearing violated the defendant's due process right to confrontation

because the prosecutor failed to establish good cause for its admission. In so doing, the Court reaffirmed its holding in *Winson* "requiring a showing of good cause before a defendant's right of confrontation at a probation revocation hearing can be dispensed with by the admission of a preliminary hearing transcript in lieu of live testimony." (*People v. Arreola*, *supra*, 7 Cal.4th at p. 1159.) "The broad standard of 'good cause' is met (1) when the declarant is 'unavailable' under the traditional hearsay standard (see Evid. Code, § 240), (2) when the declarant, although not legally unavailable, can be brought to the hearing only through great difficulty or expense, or (3) when the declarant's presence would pose a risk of harm (including, in appropriate circumstances, mental or emotional harm) to the declarant." (*Id*. at pp. 1159-1160.)

Arreola observed that "the need for confrontation is particularly important where the evidence is testimonial," whereas the witness's demeanor is generally "not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action." (*Id*. at p. 1157, fn. omitted.) This Court further emphasized that a showing of good cause for the admission of hearsay at a probation revocation hearing is "*compelled* by the due process requirements imposed by the United States Supreme Court." (*Id*. at pp. 1157-1158, emphasis in original.)

In *People v. Stanphill* (2009) 170 Cal.App.4th 61, the Third District Court of Appeal held that "spontaneous statements under [Evidence Code]

section 1240 are a special breed of hearsay exception which *automatically satisfy* a probationer's due process confrontation/cross-examination rights without the court having to find good cause for the witness's absence under *Arreola* . . . ." (*Id*. at p. 81, emphasis added.)

More recently, in *People v. Liggins* (2020) 53 Cal.App.5th 55, the First District Court of Appeal, Division Four, disagreed with *Stanphill*, finding *Stanphill*'s approach to be inconsistent with this Court's opinion in *Arreola*: "Disagreeing with an 'apparent concession' from the People to the contrary, the *Stanphill* court held that, where a proffered hearsay statement qualifies for admission under Evidence Code section 1240 as an excited utterance, the defendant's due process rights are 'automatically satisf[ied].' [Citation.] *Arreola*, it concluded, was distinguishable because neither that case nor any of the others requiring a balancing of interests involved evidence admissible under a hearsay exception. [Citaiton.] It considered the question an open one, and answered it in favor of the People where the hearsay exception at issue is the one for spontaneous statements. [Citation.] Respectfully, we do not agree with that reading of the law. In our view, *Arreola* is controlling." (*Id*. at p. 66.)

Following *Arreola*, the *Liggins* court held that determining whether hearsay evidence may be admitted in probation revocation proceedings consistent with due process, requires balancing "'the strength of the defendant's interest in confrontation . . . against the state's countervailing interests as measured by a broad standard of good cause,'" and that "[t]he good cause standard 'is met (1) when the declarant is "unavailable" under the traditional hearsay standard [citation], (2) when the declarant, although not legally unavailable, can be brought to the hearing only through great difficulty or expense, or (3) when the declarant's presence would pose a

risk of harm (including, in appropriate circumstances, mental or emotional harm) to the declarant.' [Citation.]" (*People v. Liggins*, *supra*, 53 Cal.App.5th at p. 65 [emphasis added].)

Liggins further held: "Once this showing is made, *Arreola* and *Winson* call for a case-by-case balancing of interests to determine whether the proffered hearsay may be admitted. '[I]n determining the admissibility of the evidence on a case-by-case basis,' the *Arreola* court explained, 'the showing of good cause that has been made must be considered together with other circumstances relevant to the issue, including the purpose for which the evidence is offered (e.g., as substantive evidence of an alleged probation violation, rather than, for example, simply a reference to the defendant's character); the significance of the particular evidence to a factual determination relevant to a finding of violation of probation; and whether other admissible evidence, including, for example, any admissions made by the probationer, corroborates the former testimony, or whether instead the former testimony constitutes the sole evidence establishing a violation of probation.' [Citations.]" (*Id*. at p. 65.)

In the present case, the Second District Court of Appeal, Division Two, rejected the approach in *Liggins* and instead agreed with *Stanphill*: "Does the admissibility of the bodycam video under the excited utterance exception satisfy the minimum requirements of due process applicable at probation violation hearings? The courts are split: *People v. Stanphill* (2009) 170 Cal.App.4th 61, 78 . . . says 'yes,' while *People v. Liggins* (2020) 53 Cal.App.5th 55, 66 . . . says 'no.' We side with *Stanphill*." (*People v. Gray*, *supra*, 63 Cal.App.4th at p. 949.)

This Court should grant review to resolve this conflict. (Cal. Rules of Court, rule 8.500(b)(1).)

STATEMENT OF THE CASE AND FACTS

With the exception of the following two clarifications, the case is fully stated and the facts fully set forth in the opinion of the Court of Appeal. First, the alleged probation violation in this case arose from an incident that occurred on March 30, 2019, not March 30, 2018. (See, e.g., 2 RT 1813, 1821; 2 CT 178, 282, 284; cf. *People v. Gray*, *supra*, 63 Cal.App.5th at p. 950.) Second, the opinion of the Court of Appeal also incorrectly indicates that it was "[n]early a year" after the incident that the complaining witness "told the prosecutor that she was 'lying about some things.'" (*People v. Gray*, *supra*, 63 Cal.App.5th at p. 950.) In fact, this happened less than two weeks after the incident. (See 2 RT 2105.)[2]

ARGUMENT

ADMISSION OF THE BODY CAMERA FOOTAGE PREJUDICIALLY VIOLATED APPELLANT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO CONFRONTATION.

Before and during the probation revocation hearing, appellant's trial attorney asserted both *Crawford*[3] and due process objections to the

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[2] The probation violation hearing itself occurred on October 29, 2019, seven months after the incident. (See 1 CT 279-280; 2 RT 1801.)

[3] In *Crawford v. Washington* (2004) 541 U.S. 36, the United States Supreme Court held that testimonial hearsay in criminal prosecutions is barred under the Sixth Amendment's Confrontation Clause unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant.

admission of (1) the 911 call (People's Exs. 4 and 4A [CD and transcript, respectively]), and (2) the video footage from Officer Madueno's body camera showing Natasha making statements about the March 30th incident and the events leading up to it (People Exs. 6 and 6A [video clip and transcript, respectively]). The trial court overruled these objections and admitted all but the last few lines of the 911 call and most of the body camera footage.[4] (2 RT 1813-1814, 1820-1823, 2102-2103, 2105-2117.)

As appellant shall explain, admission of the body camera footage violated appellant's federal due process right to confrontation, and the error was not harmless beyond a reasonable doubt.

A. LEGAL PRINCIPLES.

"Probation revocation proceedings are not 'criminal prosecutions' to which the Sixth Amendment applies. [Citations.] Probationers' limited right to confront witnesses at revocation hearings stems from the due process clause of the Fourteenth Amendment, not from the Sixth Amendment." (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411; accord, *People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1199, fn. 2.)

Among the minimum procedures required by due process in a probation revocation hearing is "'the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause

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[4] The trial court excluded lines 14 through 17 of the 911 call. (2 RT 1814; 2 CT 282 [transcript].) The court also excluded about the first page and a half of the body camera footage. The admitted portion of body camera footage begins with Natosha ("NS") saying "I'm just getting a hot towel," and continues to the end of the video clip. (2 RT 2106-2107, 2111, 2117; CT 286-290 [transcript].)

for not allowing confrontation) . . . .'" (*People v. Winson* (1981) 29 Cal.3d 711, 716; see *People v. Arreola* (1994) 7 Cal.4th 1144, 1152-1153.) In light of this principle, the California Supreme Court has stated "the opportunity of the accused to observe an adverse witness, while that witness testifies, is a significant aspect of the right of confrontation that may not be dispensed with lightly." (*People v. Arreola*, *supra*, 7 Cal.4th at p. 1158, citing *Coy v. Iowa* (1987) 487 U.S. 1012, 1019-1020.) "So important are these interests 'that the absence of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'" [Citation.]'" (*People v. Winson*, *supra*, 29 Cal.3d at p. 717.)

In *People v. Arreola*, the high court held that the introduction of a preliminary hearing transcript to find the defendant violated his probation violated the defendant's due process right of confrontation because the prosecutor failed to establish good cause for its admission. (*People v. Arreola*, *supra*, 7 Cal.4th at pp. 1157-1158.) In so doing, the court reaffirmed its holding in *People v. Winson*, "requiring a showing of good cause before a defendant's right of confrontation at a probation revocation hearing can be dispensed with by the admission of a preliminary hearing transcript in lieu of live testimony." (*People v. Arreola*, *supra*, 7 Cal.4th at p. 1159.) "The broad standard of 'good cause' is met (1) when the declarant is 'unavailable' under the traditional hearsay standard (see Evid. Code, § 240), (2) when the declarant, although not legally unavailable, can be brought to the hearing only through great difficulty or expense, or (3) when the declarant's presence would pose a risk of harm (including, in appropriate circumstances, mental or emotional harm) to the declarant." (*People v. Arreola*, *supra*, 7 Cal.4th at pp. 1159-1160.) "[I]n determining the admissibility of the evidence on a case-by-case basis, the showing of

good cause that has been made must be considered together with other circumstances relevant to the issue, including the purpose for which the evidence is offered (e.g., as substantive evidence of an alleged probation violation, rather than, for example, simply a reference to the defendant's character); the significance of the particular evidence to a factual determination relevant to a finding of violation of probation; and whether other admissible evidence, including, for example, any admissions made by the probationer, corroborates the former testimony, or whether instead the former testimony constitutes the sole evidence establishing a violation of probation." (*Id*. at p. 1160.)[5]

B. STANDARD OF REVIEW.

"Before a defendant's probation may be revoked, a preponderance of the evidence must support a probation violation. [Citation.] A trial court's decision to admit or exclude evidence in a probation revocation hearing will not be disturbed on appeal absent an abuse of discretion." (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1197-1198.) However, when, as

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[5] In *United States v. Comito* (9th Cir. 1999) 177 F.3d 1166, 1170, the Ninth Circuit articulated a balancing test under which a court weighs the probationer's interest in confronting the witness against the government's good cause for denying confrontation. The weight given to the right to confrontation depends primarily on "the importance of the hearsay evidence to the court's ultimate finding and the nature of the facts to be proven by the hearsay evidence." (*Id*. at p. 1171, fn. omitted.) California courts have noted that the *Comito* test is nearly identical to the one adopted by the California Supreme Court in *Arreola*. (See *In re Miller* (2006) 145 Cal.App.4th 1228, 1237; *People v. Liggins* (2020) 53 Cal.App.5th 55, 65, fn. 5.)

here, the issue presented concerns a claim that the defendant's constitutional right to due process has been violated, the standard of review is de novo. (*People v. Stanphill* (2009) 170 Cal.App.4th 61, 78.)

C. ADMISSION OF NATOSHA'S STATEMENTS CAPTURED ON THE BODY CAMERA FOOTAGE DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO CONFRONTATION.

As previously noted, the trial court overruled appellant's objections and admitted Natosha's statements to Officer Madueno captured on his body camera. With respect to appellant's *Crawford* objection (2 RT 1820), the court correctly determined that the Confrontation Clause does not apply in probation revocation hearings. (2 RT 903, 1820; see *People v. Abrams* (2007) 158 Cal.App.4th 396, 400, fn. 1 ["Because the procedural protections afforded in probation violation hearings are born out of the due process clause and not the Sixth Amendment, we can dispense with defendant's passing argument that *Crawford v. Washington* . . . governs here. *Crawford* is founded on the Sixth Amendment and does not apply to probation violation hearings."]; *People v. Gomez* (2010) 181 Cal.App.4th 1028, 1039; *People v. Johnson*, *supra*, 121 Cal.App.4th at p. 1411; *People v. Stanphill*, *supra*, 170 Cal.App.4th at p. 78.)

In analyzing defense counsel's due process objection (see 2 RT 1822, 2102), the trial court expressly relied on *People v. Stanphill*, *supra*, 170 Cal.App.4th 61, which held that "spontaneous statements under [Evidence Code] section 1240 are a special breed of hearsay exception which automatically satisfy a probationer's due process confrontation/cross-examination rights without the court having to find good cause for the

witness's absence under *Arreola* or perform the *Comito* balancing test." (*Id*. at p. 81; see 2 RT 2117.)[6] The court determined that a good portion of the body camera footage – beginning with Natosha saying "I'm just getting a hot towel" (2 CT 286), until the end of the video clip – was admissible under Evidence Code section 1240, and that admitting these spontaneous statements did not run afoul of "due process concerns." (2 RT 2105-2106, 2110-2111, 2117.)

As recently explained in *People v. Liggins*, *supra*, 53 Cal.App.5th 55, the due process analysis adopted in *Stanphill* is inconsistent with controlling California Supreme Court authority. *Liggins* involved a defendant who allegedly violated his probation by assaulting his former girlfriend. At the probation violation hearing, the trial court admitted out-of-court statements by the former girlfriend under the spontaneous statement exception, including: (1) an officer's body camera footage containing the former girlfriend making statements about the defendant's conduct; and (2) testimony by an officer about the former girlfriend's statement identifying the defendant at a cold show. (*Id*. at pp. 59-60.) The defendant argued on appeal that these statements did not qualify for admission under Evidence Code section 1240, the spontaneous statement exception to the hearsay rule, and that their admission also violated his due process right of confrontation. The court of appeal rejected the first argument but agreed with the second.

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[6] See also 2 RT 902 ["the court notes its *Stanphill* that's guiding this court"]; 2 RT 1822-1823 [in response to defense counsel's due process objection, court states that "the issue before the court properly is whether and what portions [of the video clip] are excited utterances and which are not"]; 2 RT 2111 ["I do believe the evidence before the court is competent evidence that avoids due process concerns"].)

Liggins found that while the trial court properly determined that the former girlfriend's out-of-court statements in the body camera footage and at the cold show were admissible under Evidence Code section 1240 (*People v. Liggins*, *supra*, 53 Cal.App.5th at pp. 61-63), their admission in the absence of a showing of the former girlfriend's unavailability or of good cause for the admission of hearsay from her in lieu of her live testimony, violated defendant's federal due process right of confrontation. (*Id*. at pp. 63-69.) In arriving at the latter conclusion, *Liggins* rejected, as inconsistent with *People v. Arreola*, *supra*, 7 Cal.4th 1144, the *Stanphill* court's holding that hearsay statements that qualify as spontaneous statements under Evidence Code section 1240 "automatically satisfy" a probationer's due process rights,[7] stating that such an approach "is contrary to the California Supreme Court's holding in *Arreola*, in our view, to treat Evidence Code section 1240 as an automatically applicable proxy for compliance with due process minima." (*People v. Liggins*, *supra*, 53 Cal.App.5th at p. 67.) *Liggins* also disavowed the *Stanphill* court's wholesale reliance on the "unique reliability" of spontaneous statements, stating it "conflates the backstop reliability screening that ultimately determines the admissibility of evidence offered under Evidence Code section 1240 with the constitutional question whether a defendant is entitled to subject such evidence to the ultimate test of reliability – the crucible of cross-examination and face-to-face confrontation in the courtroom." (*People v. Liggins*, *supra*, 53 Cal.App.5th at p. 67.)

The present case is virtually indistinguishable from *Liggins*. Here, as in *Liggins*, the body camera footage was admitted at trial for its truth, and it

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[7] *People v. Stanphill*, *supra*, 170 Cal.App.4th at p. 81.

is clear that "[h]ad the issue . . . arisen in a criminal trial, [Natosha's] hearsay statements would be considered testimonial." (*People v. Liggins*, *supra*, 53 Cal.App.5th at p. 67.) Indeed, the trial court here actually found that it would violate *Crawford* if the body camera footage were introduced at a criminal trial, specifically noting that appellant was already detained at the time Natosha spoke to Officer Madueno. (See 2 RT 318-320, 1820, 1823; accord, *Davis v. Washington* (2006) 547 U.S. 813, 829-831 [no ongoing emergency where complainant was protected from abusive husband in the next room by the presence of the police].) Moreover, as in *Liggins*, there was no showing of Natosha's unavailability or of good cause for the admission of hearsay in lieu of live testimony. (See *People v. Arreola*, *supra*, 7 Cal.4th at pp. 1159-1160 ["'good cause' is met (1) when the declarant is 'unavailable' under the traditional hearsay standard (see Evid. Code, § 240), (2) when the declarant, although not legally unavailable, can be brought to the hearing only through great difficulty or expense, or (3) when the declarant's presence would pose a risk of harm . . . to the declarant"].) Hence, admission of Natosha's hearsay statements violated appellant's due process right of confrontation.

D. THE ERROR WAS PREJUDICIAL.

Because the error in admitting the testimonial hearsay was of federal constitutional dimension, prejudice is assessed under the *Chapman* standard. (*People v. Arreola*, *supra*, 7 Cal.4th at p. 1161; accord, *Chapman v. California* (1967) 386 U.S. 18.) Under *Chapman*, reversal is required unless the People establish that the court's error was "harmless beyond a reasonable doubt." (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Stated differently, pursuant to *Chapman*, the People must show beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Ibid*. ["the beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"]; *People v. Aranda* (2012) 55 Cal.4th 342, 367.) An error did not contribute to the verdict when the record reveals the error was unimportant in relation to everything else the fact finder considered on the issue in question. (*Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) In the context of a criminal trial, the issue is not whether a guilty verdict would have been rendered without the error, but whether the guilty verdict actually rendered "was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Here, the error in admitting Natosha's statements captured on the body camera footage was unquestionably prejudicial. Indeed, the trial court made it perfectly clear that these out-of-court statements contributed significantly to its finding that appellant had violated his probation:

> The court is satisfied under the *Stanfill* [sic] case the spontaneous statement that the court is admitting into evidence coupled with both officers' testimony here in court as well with the evidence of the broken door frame, the 911 call where we hear the 911 caller that the court believes, based on the testimony provided by the officers, that it is Ms. [Natosha] S., the defendant breaking the door down. The court notes he's in the area. He's apprehended. The two – the 911 call and – which is ongoing. It's an ongoing issue at the point in time of the 911 call. And then her interview several

minutes later. The court actually has the unique opportunity to actually see her, hear her and see her.

It's not just an audiotape. It's not just the reiteration of an officer of these statements. Rather, it's actual video footage of who she is and how she presented at the time. Gives the court ample basis to find the defendant in violation of probation.

(2 RT 2117.)

In light of these remarks, the People cannot possibly establish that the court's error was harmless beyond a reasonable doubt. Accordingly, reversal is required.

CONCLUSION

For all the foregoing reasons, this Court should grant review.

Respectfully submitted,

William J. Capriola
Counsel for Appellant

WORD COUNT CERTIFICATE

I, William J. Capriola, in compliance with rule 8.504(d)(1), hereby certify that this document contains 4,122 words.

_____
William J. Capriola

APPENDIX "A"

Filed: 4/30/2021

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONTRAE GRAY, Defendant and Appellant.	B302236 (Los Angeles County Super. Ct. No. MA065662)

APPEAL from a judgment of the Superior Court of Los Angeles County, Renee F. Korn, Judge. Affirmed.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Paul M. Roadarmel, Jr., and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

On video recorded by a bodycam worn by a police officer, a visibly distraught woman reported that her boyfriend had beat her up. Although her statement qualifies as an "excited utterance" admissible under the hearsay rule, it is inadmissible *at trial* under the Sixth Amendment's Confrontation Clause (Confrontation Clause or Clause), as construed in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), if she is unavailable as a witness. But is it inadmissible *at a probation violation hearing* alleging the same assault if she is still unavailable as a witness? The right to cross-examination at a probation violation hearing is governed—not by the Confrontation Clause—but by due process. (*People v. Vickers* (1972) 8 Cal.3d 451, 458 (*Vickers*); *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 786 (*Gagnon*).) Does the admissibility of the bodycam video under the excited utterance exception satisfy the minimum requirements of due process applicable at probation violation hearings? The courts are split: *People v. Stanphill* (2009) 170 Cal.App.4th 61, 78 (*Stanphill*) says "yes," while *People v. Liggins* (2020) 53 Cal.App.5th 55, 66 (*Liggins*) says "no." We side with *Stanphill*. Due process is about reliability; the Confrontation Clause, confrontation. Because the bodycam video is reliable enough to fall within the firmly rooted hearsay exception for excited utterances, the dictates of due process are satisfied. We accordingly affirm the judgment finding a probation violation in this case.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In September 2015, Dontrae Gray (defendant) pled no contest to a single count of assault with a deadly weapon (Pen.

Code, § 245, subd. (a)(1))[1] and admitted that he personally inflicted great bodily injury (§ 12022.7, subd. (a)). The trial court imposed a seven-year prison sentence, but suspended its execution and placed defendant on formal probation for five years. As a condition of probation, defendant was to "obey all laws."

On March 30, 2018, defendant was arrested for assaulting his girlfriend in her home. Four minutes before the police arrived at the home, the girlfriend had called 911, reporting that "some[one]" was "trying to break" and "kick" in her door; the call also captured the girlfriend telling defendant—using his nickname—to "stop." When the police arrived mere minutes after the call, the girlfriend was "upset," "visibly crying" and "breathing heavily," and "scared to talk." While in this agitated state, she told police that defendant had shown up at her front door, screamed "Bitch, open the door," proceeded to "kick[in] the door," and then tried to punch her 20 times. The girlfriend's entire statement was captured on a bodycam worn by one of the responding officers. The officers observed that the front door, door frame and doorjamb were "broken" and "pretty trashed," and that the girlfriend had several bruises and a small scratch on her cheek consistent with being in an altercation.

The girlfriend later recanted in part. A few days after the incident, she told a police detective that she had been "mad" and merely "wanted [defendant] out of her house," and that the source of her injuries was a fall she took when she fell backwards after defendant kicked her door open. Nearly a year later, she told the prosecutor that she was "lying about some things."

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1 All further statutory references are to the Penal Code unless otherwise indicated.

II. Procedural Background

The People proceeded along two tracks. First, the People initiated a new prosecution by charging defendant with (1) inflicting corporal injury upon a person in a dating relationship (§ 273.5, subd. (a)), and (2) residential burglary (§ 459). Second, the People filed a petition alleging that the same conduct constituted a violation of probation in defendant's 2015 case.

The new prosecution was dismissed. When the girlfriend did not appear for trial despite proper service of a subpoena, the People sought to admit the bodycam video of her statement in lieu of her testimony. The trial court ruled that the girlfriend's statement on the bodycam video was inadmissible under the Confrontation Clause; the People then announced that they were unable to proceed; and the trial court granted defendant's motion to dismiss.

The probation violation proceeded to an evidentiary hearing. The trial court ruled that the girlfriend's statements on the first seven minutes of the bodycam video constituted an excited utterance admissible under Evidence Code section 1240. The court also ruled that a defendant's right to cross-examination in probation violation hearings was governed by due process (rather than the Confrontation Clause), and that the girlfriend's excited utterance constituted "competent evidence that avoids due process concerns." On the basis of the bodycam video and corroborative testimony of the responding officers, the trial court found defendant in violation of his probation and imposed the previously suspended seven-year prison sentence.

Defendant filed this timely appeal.

DISCUSSION

Citing *People v. Arreola* (1994) 7 Cal.4th 1144 (*Arreola*), defendant argues that the trial court erred in admitting his girlfriend's statement on the bodycam video because the admissibility of that statement under the excited utterance exception is not enough to satisfy due process. Instead, defendant continues, due process *also* requires (1) the People to demonstrate "good cause" by showing that the girlfriend was "legally" "unavailable" or, failing that, that there were other good reasons why she could not be brought into court to testify, *and* (2) the trial court to "balanc[e] the defendant's need for confrontation against" the need to "dispens[e] with confrontation." (*Id.* at pp. 1159-1160.) Although the People contend on appeal that there was "good cause" to admit the girlfriend's statement, the record shows only that the People unsuccessfully sought to secure her presence as she was released from custody on an unrelated matter, and that the People served her with a subpoena that she ignored; this is insufficient to establish "good cause." As a result, this appeal squarely presents the question: Does the admissibility of a hearsay statement under the excited utterance exception satisfy the due process minima applicable in probation revocation hearings, or is a further showing of good cause and a finding that a balance of factors favor admission also required? Answering this question requires us to determine the meaning of the constitutional guarantee of due process, a determination we make independently. (*People v. Zamudio* (2008) 43 Cal.4th 327, 342.)

I. The Standards Governing Probation Revocation Hearings, Generally

When a criminal defendant is placed on probation rather than sentenced to a term of incarceration, a trial court is

empowered to revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe . . . that [defendant] has violated any of the conditions of . . . [probation]." (§ 1203.2, subd. (a).) Despite coming after a criminal prosecution, the revocation of probation is itself "not *part* of [the] criminal prosecution." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 480 (*Morrissey*), italics added; *People v. Rodriguez* (1990) 51 Cal.3d 437, 441 (*Rodriguez*); *Stanphill*, *supra*, 170 Cal.App.4th at p. 72.)

As a result, a defendant facing a probation revocation is not entitled to the """full panoply of rights""" accorded to defendants "in a criminal [trial]." (*Rodriguez*, at p. 441.) The constitutional imperative of proof beyond a reasonable doubt applies at trial, but a violation of probation need only be established by a preponderance of the evidence. (*Id.* at p. 447.) In a similar vein, the Confrontation Clause applies with full force at trial (*Barber v. Page* (1968) 390 U.S. 719, 725 ["The right to confrontation is basically a trial right"]; *Correa v. Superior Court* (2002) 27 Cal.4th 444, 464-465 [same]), but the Clause does not apply at all to probation violation hearings (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411; *Liggins*, *supra*, 53 Cal.App.5th at p. 64).

Absent additional rights conferred by statute or rule, the sole *constitutional* rights applicable to a defendant facing revocation of probation are those found in the "minimum requirements of due process." (*Gagnon*, *supra*, 411 U.S. at p. 786; *Vickers*, *supra*, 8 Cal.3d at p. 457.) These minimum requirements entitle a defendant to two hearings—namely, (1) a preliminary revocation hearing and (2) a final revocation hearing. (*Gagnon*, at pp. 782-783, 786; *Vickers*, at p. 460.) And at the final

revocation hearing, due process requires, among other things,[2] "'the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).'" (*Gagnon*, at p. 786; *Black v. Romano* (1985) 471 U.S. 606, 612; *People v. Winson* (1981) 29 Cal.3d 711, 716 (*Winson*); *Vickers*, at p. 457; *Arreola*, *supra*, 7 Cal.4th at pp. 1147, 1152-1153.)

In *Arreola*, our Supreme Court further elaborated on when a trial court may dispense with the due process-based "right to confront and cross-examine adverse witnesses" at the final probation revocation hearing. Specifically, *Arreola* held that a trial court may admit an out-of-court statement despite the absence of any opportunity to cross-examine the declarant if, "on a case-by-case basis," the court (1) determines there is "good cause" to admit the statement, and (2) "balanc[es] the defendant's need for confrontation against the prosecution's showing of good cause for dispensing with confrontation." (*Arreola*, *supra*, 7 Cal.4th at p. 1159-1160.) "Good cause" exists "(1) when the declarant is 'unavailable' under the traditional hearsay standard (see Evid. Code, § 240), (2) when the declarant, although not

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2 A criminal defendant also has the right to (1) receive "'written notice of the claimed violations'" of probation, (2) "'disclosure . . . of [the] evidence against him,'" (3) an "'opportunity to be heard in person and to present witnesses and documentary evidence,'" (4) "'a "neutral and detached" hearing body,'" and (5) "'a written statement by the factfinders as to the evidence relied on and [the] reasons for revoking'" probation. (*Gagnon*, *supra*, 411 U.S. at p. 786.) The defendant is automatically entitled to the assistance of counsel in California (*Vickers*, *supra*, 8 Cal.3d at pp. 461-462), but only on a case-by-case basis under the federal Constitution (*Gagnon*, at pp. 788-790).

legally unavailable, can be brought to the hearing only through great difficulty or expense, or (3) when the declarant's presence would pose a risk of harm . . . to the declarant." (*Ibid.*) Factors relevant to the defendant's need for confrontation include (1) "the purpose for which the evidence is offered (e.g., as substantive evidence of an alleged probation violation, rather than, for example, simply a reference to the defendant's character)," (2) "the significance of the particular evidence to a factual determination relevant to a finding of [a] violation of probation," and (3) "whether other admissible evidence . . . corroborates" the statement "or whether instead the former testimony constitutes the sole evidence establishing a violation of probation." (*Id.* at p. 1160.)

II. Analysis

Is the due process-based "right to confront and cross-examine adverse witnesses" at a final probation revocation hearing satisfied when the People establish that an out-of-court statement falls within a firmly rooted hearsay exception, or must the People also show "good cause" to dispense with cross-examination and that this good cause outweighs the defendant's need for confrontation? We conclude that that the applicability of a firmly rooted hearsay exception is sufficient, and we do so for two reasons.

First and foremost, this is the rule most consonant with the purpose and function of due process as a constitutional guarantee. In criminal cases, due process mandates the procedural protections necessary to guarantee "'an accurate determination of innocence or guilt.'" (*Graham v. Collins* (1993) 506 U.S. 461, 478; accord, *Heller v. Doe* (1993) 509 U.S. 312, 332 ["the Due Process Clause" "protect[s]" "the interest of a person

subject to governmental action . . . in the accurate determination of the matters before the court"].) This is why due process mandates that guilt be established beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 367.) And it is why due process mandates the exclusion of unreliable evidence (e.g., *Sexton v. Beaudreaux* (2018) 138 S.Ct. 2555, 2559 ["'[R]eliability [of an eyewitness identification] is the linchpin' of" due process analysis]) and mandates the admission of reliable evidence even when the rules of evidence might not (e.g., *People v. Loker* (2008) 44 Cal.4th 691, 729; *People v. Williams* (2016) 1 Cal.5th 1166, 1190). Indeed, the purpose of applying due process protections to probation revocation hearings in the first place is to vindicate and protect a criminal defendant's cognizable interest "'in not having [probation] revoked *because of erroneous information* or because of an erroneous evaluation of the need to revoke [probation.]'" (*Arreola*, *supra*, 7 Cal.4th at p. 1152, quoting *Morrissey*, *supra*, 408 U.S. at p. 484, italics added.) In sum, due process ensures reliable verdicts by mandating procedures that assure the reliability of the evidence considered by the trier of fact. Because out-of-court statements that fall within a firmly rooted hearsay exception are, by definition, reliable (*Ohio v. Roberts* (1980) 448 U.S. 56, 66 (*Roberts*), overruled on other grounds by *Crawford*, *supra*, 541 U.S. 36), the fact that a statement falls within such an exception is enough by itself to achieve the purpose and function of the due process guarantees applicable to probation revocation hearings.

Second, a rule that the applicability of a firmly rooted hearsay exception is sufficient to satisfy due process is also most

consonant with California precedent.[3] The cases that hinge admissibility of out-of-court statements upon the existence of good cause and the balancing of that cause against the defendant's interest in confrontation each involved statements that were inadmissible under the rules of evidence. (*Arreola*, *supra*, 7 Cal.4th at pp. 1160-1161 [preliminary hearing testimony did not fall under former testimony exception to hearsay rule because declarant was never shown to be legally unavailable]; *Winson*, *supra*, 29 Cal.3d at p. 719 [same]; *People v. Maki* (1985) 39 Cal.3d 707, 709, 713-714 (*Maki*) [documentary evidence did not fall under business records exception to hearsay rule].)[4]

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3 The federal courts have adopted a different rule, but that is chiefly because Federal Rule of Criminal Procedure 32.1(b)(2)(C) provides that a person subject to a revocation hearing "is entitled to" "question any adverse witness unless the court determines that the interest of justice does not require the witness to appear," and the Advisory Committee Note to that provision specifies that the court, "when considering the . . . right to cross-examine adverse witnesses," "should" "balance the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it." (Fed. R. Crim. P. 32.1, Adv. Com. Note.) The federal circuit courts have uniformly read this provision to require a showing of good cause and balancing, even though several circuits had previously held that due process was satisfied by the applicability of a firmly rooted hearsay exception. (*United States v. Jones* (10th Cir. 2016) 818 F.3d 1091, 1099-1100; *Curtis v. Chester* (10th Cir. 2010) 626 F.3d 540, 545.)

4 Thus, the distinction those cases draw between "documentary evidence" and "live testimony" becomes relevant only if no hearsay exception applies. (*Arreola*, *supra*, 7 Cal.4th at pp. 1152-1153; *Maki*, *supra*, 39 Cal.3d at p. 709.)

Many of them suggested that the inquiry into good cause and consequent balancing would have been unnecessary had a hearsay exception applied. (E.g., *Maki*, at p. 710 [urging trial courts to "first consider whether" any "pertinent exceptions to the hearsay rule" "applied" before "inquir[ing] as to whether and what flexible [due process] standards may be applied"]; *In re Eddie M.* (2003) 31 Cal.4th 480, 501-502 [so suggesting].) Indeed, reading these cases to mandate an inquiry into "good cause" and balancing when a hearsay exception applied would make no sense. At the time these cases were decided, the Confrontation Clause applicable at trial did not bar the admission of hearsay falling into a firmly rooted hearsay exception and, as to such hearsay, did not require any showing of unavailability of the hearsay declarant. (*Roberts*, *supra*, 448 U.S. at p. 66; *United States v. Inadi* (1986) 475 U.S. 387, 400 [Clause does not require showing of "unavailability" for coconspirator exception to hearsay rule]; *White v. Illinois* (1992) 502 U.S. 346, 358 (*White*) [same, for excited utterance exception].) If, as defendant suggests, *Arreola* and its kin held that admissibility under a hearsay exception was not enough by itself to satisfy due process, then the standard for admitting hearsay in probation revocation hearings would be more onerous than the standard for admitting hearsay at trial. This has it completely backwards, given that due process is meant to be more flexible than the Confrontation Clause (e.g., *Maki*, at p. 715), not less.

Thus, both the purpose and function of due process generally, as well as the California precedent addressing the issue, strongly suggest that out-of-court statements falling within a firmly rooted hearsay exception are properly admitted at a probation revocation hearing.

Of course, *Arreola* and its kin were all decided before *Crawford*, *supra*, 541 U.S. 36. *Crawford* changed the meaning of the Confrontation Clause. The Clause secures "the accused . . . the right . . . to be confronted with the witnesses against him [or her]." (U.S. Const., 6th Amend.) For obvious reasons, the Clause is implicated whenever a court admits an out-of-court declaration for its truth when the declarant is not available for cross-examination. (*Crawford*, at p. 59, fn. 9.) Prior to *Crawford*, the U.S. Supreme Court held in *Roberts*, *supra*, 448 U.S. 56 that the Clause reached *all* out-of-court statements, but conditioned their admissibility on whether they fell into a firmly rooted hearsay exception or bore other "particularized guarantees of trustworthiness." (*Roberts*, at p. 66.) In its 2004 *Crawford* decision, the court jettisoned *Roberts*'s framework and redefined the scope and effect of the Clause. Under *Crawford*, the Clause reaches only "testimonial" statements (that is, those out-of-court statements made for the "'primary purpose'" of "'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution'"), but excludes them unless there was a prior opportunity for cross-examination and unless the declarant is legally unavailable (*Crawford*, at pp. 55-56, 68; *Michigan v. Bryant* (2011) 562 U.S. 344, 356, quoting *Davis v. Washington* (2006) 547 U.S. 813, 822). Does *Crawford*'s redefining of the Confrontation Clause justify a change to the due process-based right of cross-examination applicable during probation revocation hearings?

Liggins thought the standard for admitting out-of-court statements under due process was, on some level, tethered to the standard for doing so under the Clause. (*Liggins*, *supra*, 53 Cal.App.5th at p. 68 [finding that the "paradigm shift brought

about by *Crawford* is relevant" to the due process analysis applicable during probation revocation hearings].)

We do not.

In redefining the Confrontation Clause, *Crawford* rejected *Roberts*'s view of the Clause. Under *Roberts* and its progeny, the "very mission" of the Clause was "to advance 'the accuracy of the truth-determining process in criminal trials'" (*Tennessee v. Street* (1985) 471 U.S. 409, 415) and to "promot[e] . . . the '"integrity of the factfinding process"'" (*White*, *supra*, 502 U.S. at pp. 356-357, quoting *Coy v. Iowa* (1988) 487 U.S. 1012, 1020). *Roberts* viewed the Clause as adopting a "preference" for cross-examination in service of its mission of achieving accurate and reliable verdicts. (*Roberts*, *supra*, 448 U.S. at p. 63.) In rejecting *Roberts*, *Crawford* construed the Clause as having a different mission—namely, "command[ing], not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Crawford*, *supra*, 541 U.S. at p. 61.) In other words, *Crawford* changed the Clause's marquee from "RELIABILITY featuring Confrontation" to "CONFRONTATION." In changing the focus of the Clause from reliability to confrontation, *Crawford* rendered the Clause less suitable as a screen for reliable evidence. Indeed, the U.S. Supreme Court subsequently declined to declare *Crawford* fully retroactive to cases on collateral review precisely because it was "unclear whether *Crawford*, on the whole, decreased or increased the number of unreliable out-of-court statements that may be admitted in criminal trials" or otherwise "resulted in [a] net improvement in the accuracy of fact finding in criminal cases." (*Whorton v. Bockting* (2007) 549 U.S. 406, 420.) Because due process remains focused on the reliability of evidence and the

accuracy of the resulting verdicts, *Crawford*'s shift away from reliability makes it *less* relevant as a bellwether and hence less useful as a tether. (Accord, *United States v. Hall* (9th Cir. 2005) 419 F.3d 980, 985 ["In *Crawford*, the Supreme Court addressed the Sixth Amendment rights of the accused in criminal prosecutions; it did not address the due process rights attendant to post-conviction proceedings for violations of conditions of release"].)

Applying the rule we adopt today, the bodycam video containing the girlfriend's statement was properly admitted. The excited utterance exception to the hearsay rule is a firmly rooted exception. (*White*, *supra*, 502 U.S. at p. 355, fn. 8.) And it is so considered for good reason—namely, because statements made while the declarant is excited are "particularly likely to be truthful" "since [such a] statement is made spontaneously, while under the stress of excitement and with no opportunity to contrive or reflect . . . ." (*People v Hughey* (1987) 194 Cal.App.3d 1383, 1392-1393, italics omitted; *Stanphill*, *supra*, 170 Cal.App.4th at p. 81.) This conclusion does not, as *Liggins* suggests, make an excited utterance "effectively irrebuttable" (*Liggins*, *supra*, 53 Cal.App.5th at p. 69), as the trial court in this case considered the girlfriend's partial recantations and elected to credit her contemporaneous and spontaneous report over her later statements.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ

DECLARATION OF SERVICE

I, William J. Capriola, declare that I am over eighteen years of age, and not a party to the within cause; my employment address is Post Office Box 1536, Sebastopol, California 95473. I served a true copy of the attached PETITION FOR REVIEW on each of the following, by placing same in envelopes addressed as follows:

Los Angeles County Superior Court
210 West Temple Street, Room M-6
Los Angeles, CA 90012

Los Angeles County District Attorney
210 West Temple Street, Room 18-709
Los Angeles, CA 90012

Dontrae Gray, BK-9347
P.O. Box 5006
Calipatria, CA 92233

Each envelope was then, on June 9, 2021, sealed and deposited with the United States Postal Service at Sebastopol, California, in the county in which I am employed, with the first class postage thereon fully prepaid.

I also electronically served true copies of the attached document on June 9, 2021, upon the following persons at the following email addresses:

California Appellate Project
capdocs@lacap.com

Office of the Attorney General
docketingLAAWT@doj.ca.gov

Second District Court of Appeal, Div. Two
via TrueFiling

I declare under penalty of perjury that the foregoing is true and correct. Executed at Sebastopol, California, on June 9, 2021.

_____
William J. Capriola