IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DONTRAE GRAY, Defendant and Appellant.	No. S269237 Court of Appeal No. B302236 Los Angeles No. MA065662

On Appeal from a Judgment of
the Superior Court of the State of California
in and for the County of Los Angeles

The Honorable Sam Ohta
Judge Presiding

APPELLANT'S OPENING BRIEF ON THE MERITS

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STATEMENT OF ISSUE ON REVIEW

Did the trial court violate the due process right to confrontation applicable at probation and parole revocation hearings by admitting hearsay statements in a bodycam video under the excited utterance exception (Evid. Code, § 1240) without first making a finding of good cause and determining whether a balancing of the relevant factors under *People v. Arreola* (1994) 7 Cal.4th 1144 favored admission?

STATEMENT OF THE CASE

On September 8, 2015, appellant entered a plea of no contest to a single count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), and admitted personally inflicted great bodily injury in the commission of the offense (Pen. Code, § 12022.7, subd. (a)). The trial court imposed a seven-year state prison term, suspended execution of the sentence, and placed appellant on formal probation for five years, the conditions of which included compliance with all laws. (1 Clerk's Transcript [CT] 84-87; 2 Reporter's Transcript [RT] A1-A9.)

On March 30, 2019, appellant was arrested in connection with an alleged incident of domestic violence. Based on that arrest, the prosecution charged appellant with violating probation in the 2015 case, and also filed a new case against appellant charging him with inflicting corporal injury upon an intimate partner (Pen. Code, § 273.5, subd. (a)) and residential burglary (Pen. Code, § 459). (See 2 CT 172-190, 246-247, 250-252.)

On October 1, 2019, at the request of the People, the new case was dismissed. (2 CT 272; 2 RT 605-606, 611-613.)

On October 30, 2019, following a contested hearing in the probation revocation matter, the trial court found appellant in violation of his probation and imposed the previously suspended sentence of seven years in state prison. (2 CT 291-294; 2 RT 2117-2220.)

Appellant timely appealed. (2 CT 296.)

In a published opinion filed April 30, 2021, the Court of Appeal for the Second Appellate District, Division Two affirmed the judgment. (*People v. Gray* (2021) 63 Cal.App.5th 947.)

On July 14, 2021, this Court granted appellant's petition for review.

STATEMENT OF FACTS

The following evidence was presented at appellant's October 30, 2019 probation revocation hearing:

A. NON-BODY CAMERA FOOTAGE EVIDENCE.

At approximately 8:00 a.m. on March 30, 2019, the police received a 911 call from a woman, later identified as Natosha, who could be heard trying to persuade a person named "Joe-Joe" from "trying to break" and "kick" in the door of a residence on 11th Avenue. (2 CT 282; 2 RT 1817.)

A Los Angeles Police Department gang officer testified that appellant's gang moniker was "Jo-Jo." (2 RT 1803-1806.)

Officer Manuel Madueno and his partner, Officer Grube, arrived at the residence – an apartment in a multi-unit complex – approximately four minutes after the 911 call was placed. (2 RT 1815, 1817, 1821-1822.) Officer Madueno had been to the same residence the day before due to a reported argument. (2 RT 1815, 1825-1827.) On that prior occasion, Officer Madueno had a very brief conversation with a woman named Natosha. Based on what Natosha told him, Officer Madueno determined there was no crime involved and left. (2 RT 1816, 1827.)

Two other officers, Pellyk and Tavera, were also at the scene on March 30, 2019. (2 RT 1817-1818.) They went to the rear of the residence and detained appellant there. (2 RT 1818, 1824-1825, 1837.)

Officer Madueno and his partner went to the front of the residence. (2 RT 1818, 1822.) Some of the wood on the doorjamb had been broken off and the door itself was damaged. (2 RT 1831-1833.) After appellant had already been taken into custody by the other officers (see 2 RT 317-318, 1824-1825, 1828; 2 CT 178), Officer Madueno entered the residence

and spoke to Natosha in the living room, which was "pretty trashed." (2 RT 1815-1816, 1828-1829.) An older disabled woman whom Natosha took care of was also present at the time, although the woman did not say or do anything while Madueno was there. (2 RT 1829-1830.) Natosha was breathing heavily, appeared frightened, and had suffered injuries, including bruises on her arm, back, and shoulder, and a small scratch on her cheek. (2 RT 1833-1836, 1842.) She did not seek medical attention for her injuries. (2 RT 1844.)

B. THE BODY CAMERA VIDEO.

Natosha did not testify at the probation revocation hearing. Rather, over defense objection, the prosecution presented body camera footage of her conversation with Officer Madueno the morning of the incident.

During the recorded conversation, Natosha stated that she and appellant had dated for about two months. (2 CT 286.) Natosha indicated that she had called the police twice the day before: once in the daytime and once at night. Officer Madueno responded to the first call. (2 CT 287.) Natosha called again at about 7:00 p.m. because appellant was at her residence with another girl and was refusing to leave. The police came and told appellant to go. (2 CT 287-288.) Appellant and his mother apparently came back later that night for his belongings. Natosha gave the belongings to appellant's mother, then went to sleep. (2 CT 288.)

In the morning, Natosha checked her phone and saw that appellant had been calling her. (2 CT 288.) Meanwhile, the disabled woman Natosha took care of had fallen out of bed. As Natosha was in the bedroom trying to assist the woman, she heard appellant at the back door telling her to open the door: "he's all bitch open the door and this stuff and I'm like you know I'm trying to get [the disabled woman]." (*Ibid*.) Natosha went to the back

door and told appellant that he was "always hitting [her] and everything else" and that she was not going to open the door. (*Ibid*.)

Appellant went around to the front of the residence, opened the metal screen door with a key he had stolen, then kicked in the main door. (2 CT 288; 2 RT 1843.) Natosha tried holding a chair against the door but was unable to keep appellant out. (2 CT 289.) Appellant entered the apartment and started "punching [Natosha] everywhere" and "stomping [her] out." (2 CT 288.) Appellant punched her about 20 times, mainly on her arms. (2 CT 289-290.) She fell down but did not lose consciousness. (2 CT 290.)

C. RECANTATION EVIDENCE.

Natasha later recanted in part.

About three days after the incident, Natosha told a detective that when she told the police appellant had hit her, she was "mad" and wanted him "out of her house." (2 RT 2103-2104.) She also told the detective that the source of her injuries was a fall she took when she fell backwards after appellant kicked the door open. (2 RT 2104.)

About 12 days after the incident, Natosha told the prosecutor that she was "lying about some things." (2 RT 2105.)[1]

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[1] The opinion of the Court of Appeal mistakenly indicates that Natosha made this statement "[n]early a year later" (*People v. Gray*, *supra*, 63 Cal.App.5th at p. 950), when in fact it was stipulated that the prosecutor notified defense counsel of his conversation with Natosha in an email dated April 11, 2019 – less than two weeks after the March 30, 2019 incident at the apartment. (2 RT 2105.) A related misstatement in the Court of Appeal's opinion is that the incident itself occurred on "March 30, 2018." (*People v. Gray*, *supra*, at p. 950.)

ARGUMENT

THE TRIAL COURT AND THE COURT OF APPEAL ERRED IN HOLDING THAT A HEARSAY STATEMENT THAT QUALIFIES FOR ADMISSION AS AN EXCITED UTTERANCE UNDER EVIDENCE CODE SECTION 1240, AUTOMATICALLY SATISFIES A DEFENDANT'S DUE PROCESS RIGHT OF CONFRONTATION AND IS ADMISSIBLE AT A PROBATION REVOCATION PROCEEDING WITHOUT THE NEED FOR ANY SHOWING OF GOOD CAUSE OR ANY BALANCING OF INTERESTS UNDER *ARREOLA*.

As the Court's framing of the question suggests, the gravamen of the dispute in this case is whether the reasoning of the Court of Appeal in the present case, and the earlier case of *People v. Stanphill* (2009) 170 Cal.App.4th 61, which adopted a rule of per se constitutionality for excited utterances, justifies departure from the principles set out by this Court in *People v. Arreola*, *supra*, 7 Cal.4th 1144. As will be seen, neither *Stanphill* nor the present case offer any substantial authority nor persuasive reasoning for dispensing with the right of confrontation at a probation revocation hearing without a showing of good cause for the hearsay declarant's absence and a case-by-case balancing of interests as required under *Arreola*.

A. PROCEDURAL BACKGROUND.

Appellant's trial attorney asserted both "*Crawford*"[2] and due process objections to the admission of Officer Madueno's body camera footage, which captured Natasha making statements about the March 30, 2019 incident and the events leading up to it. The trial court overruled both objections and admitted most of the statements. (2 RT 1813-1814, 1820-1823, 2102-2103, 2105-2117.)

With respect to the *Crawford* objection, the trial court determined that the Confrontation Clause does not apply in probation revocation proceedings. (2 RT 903, 1820.)[3]

In analyzing defense counsel's due process objection, the trial court 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 . . .." (*Id*. at p. 81; see 2 RT 2117.) The trial court determined that a good portion of the body camera footage – beginning with Natosha ("NS") 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 2105-2107, 2110-2111, 2117; 2 CT 286-290.)

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[2] *Crawford v. Washington* (2004) 541 U.S. 36.

[3] The propriety of this ruling is undisputed. (See, e.g., *People v. Abrams* (2007) 158 Cal.App.4th 396, 400, fn. 1 ["*Crawford* is founded on the Sixth Amendment and does not apply to probation violation hearings."].)

On appeal, the Court of Appeal affirmed, concluding that the body camera video containing Natasha's statement was properly admitted. The Court of Appeal found that although the prosecution had failed to establish good cause for not securing Natasha's presence at the revocation hearing, the applicability of a firmly rooted hearsay exception is per se sufficient to satisfy due process, and that because Natasha's statement fell within the firmly rooted hearsay exception for excited utterances, due process was satisfied. (*People v. Gray*, *supra*, 63 Cal.App.5th at pp. 949, 951, 953-957.)

B. *WINSON*, *MAKI*, AND *ARREOLA*.

To satisfy the federal Constitution, *Morrissey v. Brewer* (1972) 408 U.S. 471, 489 and *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 786, generally require that a defendant at a parole or probation revocation hearing be provided with "the right 'to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation) . . . .'" (*People v. Arreola* (1994) 7 Cal.4th 1144, 1158; see also *Black v. Romano* (1985) 471 U.S. 606, 612.)[4] This right arises from the Due Process Clause of the Fourteenth Amendment, rather than from the Sixth Amendment, because a revocation proceeding is not a criminal proceeding. (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411.)

In *People v. Winson* (1981) 29 Cal.3d 711, this Court concluded that "[a] preliminary hearing transcript of a witness' testimony in a defendant's related criminal case is not a proper substitute for live testimony of the

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[4] Parole and probation revocation proceedings are equivalent in terms of the requirements of due process. (*Gagnon v. Scarpelli*, *supra*, 411 U.S. at p. 782 & fn. 3; *People v. Vickers* (1972) 8 Cal.3d 451, 458.)

witness at defendant's probation revocation hearing in the absence of the declarant's unavailability or other good cause." (*Id*. at pp. 713-714.) The Court stated: "Our conclusion that a finding of good cause is required before the preliminary hearing transcript may be used at a revocation hearing is thus compelled by the high court's precise enunciation of minimum due process requirements in such proceedings. It also is compelled by the emphasis of the Supreme Court on the equal value of cross-examination and the opportunity for observation of the witness' demeanor." (*Id*. at p. 717.) *Winson*, however, further noted that "within this context the right of confrontation is not absolute. Confrontation may be denied if the trier-of-fact finds and expresses good cause for doing so. Thus, the risk of harm to an informant may suffice to deny a parolee the right to confrontation. [Citations.] Generally, if the witness is legally unavailable, the former testimony may be admitted. Similarly, where 'appropriate,' witnesses may give evidence by document, affidavit or deposition." (*Id*. at p. 719; see *Gagnon v. Scarpelli*, *supra*, 411 U.S. 782-783, fn. 5 ["we did not in *Morrissey* intend to prohibit use *where appropriate* of the *conventional* substitutes for live testimony, including affidavits, depositions, and documentary evidence"], italics added.) *Winson* observed that "[t]he issue of whether former testimony may be utilized in

lieu of a witness' personal appearance is best resolved on a case-by-case basis." (*People v. Winson*, *supra*, 29 at p. 719.)[5]

People v. Maki (1985) 39 Cal.3d 707 sought to "clarify the standards for admitting documentary evidence at probation and parole revocation hearings," and concluded that "documentary hearsay evidence which does not fall within an exception to the hearsay rule may be admitted if there are sufficient indicia of reliability regarding the proffered material . . . ." (*Id*. at p. 709.) In arriving at that conclusion, the Court adverted to its observation in *Winson* that the right of confrontation at a revocation hearing is "not absolute and where '"appropriate," witnesses may give evidence by document, affidavit or deposition.'" (*Id*. at p. 710.) Although this Court found the issue in *Maki* to be "a close one," it ultimately found that the trial court had properly considered two documents that had been seized from defendant's home – an out-of-state car rental invoice and out-of-state hotel receipt – in finding defendant had violated the terms of his probation by leaving the geographical area to which he had been restricted. (*Id*. at p. 716-717.) The "significant factor" according to the Court, was "the uncontroverted presence of defendant's signatures on the invoice." (*Id*. at p. 716.)

In *People v. Arreola* (1994) 7 Cal.4th 1144, this Court reaffirmed its holding in *Winson* "requiring a showing of good cause before a defendant's

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[5] In the case before it, the *Winson* court was persuaded by this combination of circumstances: "the testimony at issue was that of the sole percipient witness to the alleged parole violation, a finding of no legal unavailability was made in the underlying proceedings in which the charges were then dismissed, no additional evidence was introduced which established the witness' unavailability, and the court made no specific finding of good cause for denying the right to confront and cross-examine." (*Ibid*.)

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." (*Id*. at p. 1159.) The *Arreola* court explained that the admissibility of the evidence must be made on a case-by-case basis. (*Id*. at pp. 1159-1160.) The standard of "good cause" can be met by showing that the declarant is unavailable under the traditional hearsay standard, the declarant can be brought to the hearing only through great difficulty or expense, or the declarant's presence would pose a risk of harm to the declarant. (*Ibid*.) Moreover, the good cause showing must be considered together with other relevant circumstances, including the purpose for which the evidence is offered, the significance of the evidence to the factual determination upon which the alleged probation violation is based, and whether other admissible evidence corroborated the evidence in question. (*Id*. at p. 1160.)

In *Arreola* itself, the prosecution failed to offer any justification for not securing the declarant's presence at the probation revocation hearing. Accordingly, this Court concluded that, since there was no showing of good cause, the trial court's admission of the preliminary hearing transcript at the probation revocation hearing violated defendant's federal constitutional right to due process. (*People v. Arreola*, *supra*, 7 Cal.4th at pp. 1160-1161.)

Arreola also explained the rationale for the different treatment of documentary evidence and former testimony as follows: "There is an evident distinction between a transcript of former live testimony and the type of traditional 'documentary' evidence involved in *Maki* that does not have, as its source, live testimony. [Citation.] As we observed in *Winson*, the need for confrontation is particularly important where the evidence is

testimonial, because of the opportunity for observation of the witness's demeanor. [Citation.] Generally, the witness's demeanor is 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." (*People v. Arreola*, *supra*, 7 Cal.4th at p. 1157, fn. omitted.)

The "lessons of *Maki*, *Winson* and *Arreola*," were applied in *People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1201. There, the prosecution alleged the defendant had violated the terms of his probation by consuming alcohol. (*Id*. at p. 1196.) At the revocation hearing, the defendant's probation officer testified that he had been informed by a treatment program administrator that the defendant had smelled of, and tested positive for, alcohol consumption. The program administrator did not testify and no other evidence supported the administrator's out-of-court statements that the defendant consumed alcohol in violation of his probation. Further, it was unclear whether the administrator had observed the defendant's alleged probation violation or whether she had simply reported what she had been told by other, unidentified witnesses. (*Id*. at p. 1198.) In these circumstances, *Shepherd* found that the good cause standard set forth in *Arreola* and *Winson* was controlling, rather than the more lenient indicia of reliability standard set forth in *Maki*, and that it was error to admit the probation officer's hearsay testimony because there had been no showing that the administrator was unavailable or that other good cause existed for

not securing her live testimony at the revocation hearing. (*Id*. at pp. 1201-1203.)

C. HEARSAY EVIDENCE THAT REPLACES THE LIVE TESTIMONY OF A WITNESS IS INADMISSIBLE ABSENT A SHOWING OF THE WITNESS'S UNAVAILABILITY OR OTHER GOOD CAUSE AND A BALANCING OF INTERESTS UNDER *ARREOLA*, REGARDLESS OF WHETHER THE EVIDENCE FALLS UNDER A FIRMLY ROOTED HEARSAY EXCEPTION SUCH AS THAT FOR EXCITED UTTERANCES.

The unsworn hearsay statement of an alleged victim to a law enforcement officer, like the one in the present case, would appear to land firmly on "the *Winson-Arreola* side of the line." (*People v. Abrams*, *supra*, 158 Cal.App.4th at p. 405 ["Evidence that is properly viewed as a substitute for live testimony, such as statements to a probation officer by victims or witnesses, likely falls on the *Winson-Arreola* side of the line."]; see *People v. Arreola*, *supra*, 7 Cal.4th at p. 1157 ["need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness's demeanor"].) However, in *People v. Stanphill*, *supra*, the Court of Appeal for the Third Appellate District held that "the due process balancing test for admissibility of hearsay [at a revocation hearing] does not apply to evidence falling within the hearsay exception for spontaneous statements." (*People v. Stanphill*, *supra*, 170 Cal.App.4th at p. 78.) *Stanphill* found that *Arreola* and other cases requiring good cause and a balancing of interests were distinguishable

because "they did not turn on evidence falling within a recognized hearsay exception, such as that for spontaneous statements." (*Id*. at p. 79.) According to *Stanphill*, "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*[6] balancing test." (*People v. Stanphill*, *supra*, at p. 81.) "'The theory of the spontaneous statement exception to the hearsay rule,'" the *Stanphill* court noted, "'is that since the statement is made spontaneously, while under the stress of excitement and with no opportunity to contrive or reflect, it is *particularly* likely to be truthful.'" (*Id*. at p. 81, italics in original.)

Stanphill's rule of per se constitutionality for excited utterances was rejected by the First District Court of Appeal, Division Four, in *People v. Liggins*, *supra*, 53 Cal.App.5th 55. *Liggins* found that *Arreola* was "controlling" on the issue and that it was contrary to *Arreola* "to treat Evidence Code section 1240 as an automatically applicable proxy for compliance with due process minima." (*Id*. at pp. 66-67.) The problem with the *Stanphill* case's reasoning, according to *Liggins*, is that it

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[6] *United States v. Comito* (9th Cir. 1999) 177 F.3d 1166. In *Comito*, 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 this 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.)

"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." (*Id*. at p. 67.) *Liggins* pointed out that in *Arreola*, this Court "rejected the contention that there is a generally applicable rule of admissibility for prior testimony upon a showing of 'sufficient indicia of reliability.' [Citation.]" (*Id*. at p. 66, quoting *People v. Arreola*, *supra*, 7 Cal.4th at p. 1156.) Reliability, explained *Liggins*, "has a place in the case-by-case weighing of interests required by *Arreola*[,] [b]ut it is only one of several factors to be weighed, and it must not be assigned dispositive weight in all cases to the exclusion of other factors." (*People v. Liggins*, *supra*, at p. 69.)

Similar to *Stanphill*, the Court of Appeal in the present case held that where hearsay qualifies for admission under a firmly rooted hearsay exception, a defendant's due process rights at a revocation hearing are automatically satisfied. (*People v. Gray*, *supra*, 63 Cal.App.5th at pp. 949, 953.) The Court of Appeal believed that this rule was the one "most consonant" with "the purpose and function of due process," which the court narrowly identified as "reliability." (*Id*. at p. 953-954; see also *Id*. at p. 949 ["[d]ue process is about reliability"]; *Id*. at p. 957 ["due process remains focused on the reliability of evidence and the accuracy of the resulting verdicts"].) On that basis, the court concluded that since "due process ensures reliable verdicts by mandating procedures that assure the reliability of the evidence considered by the trier of fact," and "[b]ecause 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 . . . overruled

on other grounds in *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." (*People v. Gray*, *supra*, at p. 954.)

The Court of Appeal's justification for departing from the unambiguous commands of the *Arreola* and *Morrissey* line of cases is far from satisfying. Due process is more than just the narrow concern for reliability. The true hallmarks of due process are fundamental fairness and flexibility. (See, e.g., *Gagnon v. Scarpelli*, *supra*, 411 U.S. at p. 790 ["fundamental fairness – the touchstone of due process"]; *Salas v. Cortez* (1979) 24 Cal.3d 22, 27 ["The touchstone of due process is fundamental fairness."]; *Morrissey v. Brewer*, *supra*, 408 U.S. at p. 481 ["It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.]; see also *United States v. Martin* (9th Cir 1993) 984 F.2d 308, 310 [right to confront and cross-examine adverse witnesses requires that a probationer "receive a fair and meaningful opportunity to refute or impeach the evidence against him in order to 'assure that the finding of a [probation] violation will be based on verified facts'"].) As the United States Supreme Court has noted, "'The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of

other considerations, fall short of such denial.' [Citation.]" (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 850.)

The approach adopted by the Court of Appeal, which replaces a case-by-case balancing approach with a fixed rule, is inconsistent with the purpose and function of due process. Moreover, the Court of Appeal fails to recognize that confrontation and cross-examination are necessary steps to finding hearsay evidence reliable. (See, e.g., *California v. Green* (1970) 399 U.S. 149, 158 [describing cross-examination as the "'greatest legal engine ever invented for the discovery of truth"'].)

Furthermore, with respect to the firmly rooted hearsay exception for excited utterances, it is not at all clear that such statements are actually reliable. (See *Lust v. Sealy, Inc.* (7th Cir. 2004) 383 F.3d 580, 588 (Posner, J., concurring) ["The rationale for these exceptions is that spontaneous utterances, especially in emotional circumstances, are unlikely to be fabricated, because fabrication requires an opportunity for conscious reflection. [Citations.] As with much of the folk psychology of evidence, it is difficult to take this rationale entirely seriously, since people are entirely capable of spontaneous lies in emotional circumstances. 'Old and new studies agree that less than one second is required to fabricate a lie.' [Citations.]"]; *United States v Boyce* (7th Cir. 2014) 742 F3d 792, 801-802 (Posner, J., concurring) ["the exception for excited utterances rests on no firmer ground than judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogma"]; Steven Baicker-McKee, *The Excited Utterance Paradox* (2017) 41 Seattle Univ. L.Rev. 111, 114 ["Psychological studies suggest that stressful events trigger the '(fight)-or-flight' response, and that deceptive statements are not only possible, they can be a natural component . . . . A traumatic event

dramatically increases cognitive load, leading to perception deficits and distortions. Thus, excited witness perceptions tend to be unreliable for many reasons."]; Melissa Hamilton, *The Reliability of Assault Victims' Immediate Accounts: Evidence from Trauma Studies* (2015) 26 Stanford L. & Policy Rev. 269, 304 ["The excited utterance, present sense impression, and statement of current mental or bodily condition exceptions to the hearsay rule were developed with good intentions. . . . [However,] [w]hen evidence rules are based on human intuition and pop psychology visions of normal human behavior . . . the function of the factfinding process is impeded, perhaps even inverted. . . . [¶] . . . [T]he folk psychological presumptions underlying the three hearsay exceptions fail the test of scientific validity in light of recent scientific research."].)

The Court of Appeal also concluded that a rule of per se admissibility for hearsay evidence which satisfies a firmly rooted hearsay exception is "most consonant with California precedent," asserting that "many" cases that hinge the admissibility of out-of-court statements on the existence of good cause and *Arreola* balancing have "suggested that the inquiry into good cause and consequent balancing would have been unnecessary had a hearsay exception applied." (*People v. Gray*, *supra*, 63 Cal.App.5th at pp. 954-955.) However, neither of the two cases cited by the Court of Appeal on this point – *People v. Maki*, *supra*, 39 Cal.3d 707 and *In re Eddie M.* (2003) 31 Cal.4th 480 – deliver the promised support.

The *Stanphill* court made a similar assertion with respect to *Maki*, pointing out that, in dictum, this Court had said that if the documentary evidence in question was admissible under an exception to the hearsay rule, "'then there is no need to inquire as to whether and what flexible standards may be applied to the use of otherwise inadmissible documentary evidence

in revocation proceedings.'" (*People v. Stanphill*, *supra*, 170 Cal.App.4th at p. 80, quoting *People v. Maki*, *supra*, at p. 710.) However, the dictum in *Maki* is specifically limited to "documentary" evidence, and the case does not suggest that due process would be satisfied by allowing otherwise admissible non-documentary evidence to be admitted without first making a finding of good cause and determining whether a balancing of the relevant factors favored admission.

The other case cited by the Court of Appeal is also unavailing. In *Eddie M.*, which involved a question relating to the amendment of Welfare and Institutions Code section 777 by Proposition 21 (the Gang Violence and Juvenile Crime Prevention Act of 1998), the Court simply noted that "hearsay evidence that is inadmissible to prove guilt in a criminal trial may be admissible to prove an adult probation violation under certain circumstances." (*In re Eddie*, *supra*, 31 Cal.4th at pp. 501-502 [citing *Winson*, *Maki*, and *Arreola*].) The basic fact that more lenient rules of evidence apply at probation revocation hearings than at trial, in no way suggests that if a hearsay exception applies, then the proffered evidence is admissible without any showing of good cause or any balancing at all.

The opinion of the Court of Appeal in this case also stated that "[i]f . . . *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 proceedings 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 [citation], not less." (*People v. Gray*, *supra*, 63 Cal.App.5th at p. 956.) This statement is inaccurate for several reasons. In the first place, the fact that the standard for admitting hearsay at a probation

revocation hearing might be more difficult to meet than the standard for admitting that same evidence at a criminal trial, does not mean the former is less flexible. On the contrary, in contrast to the balancing test set forth in *Arreola*, there is no weighing and balancing of interests when evidence is admitted under a firmly rooted hearsay exception such as Evidence Code section 1240.

Nor would it necessarily be any easier to admit non-testimonial hearsay at trial than at a revocation hearing subject to *Arreola* balancing. Addressing a similar concern in *Valdivia v. Schwarzenegger* (9th Cir 2010) 599 F.3d 984, the Ninth Circuit noted that subjecting state parole revocation hearings to the balancing requirements established in *United States v. Comito*, *supra*, 177 F.3d 1166, "does not elevate the due process rights of parolees over those of criminal defendants." (*Valdivia v. Schwarzenegger*, *supra*, at p. 991.) As explained in *Valdivia*,

> Hearsay evidence that is testimonial in nature . . . regardless of any exceptions, is inadmissible against a criminal defendant under *Crawford*. However, both testimonial and non-testimonial hearsay are admissible against a parolee, provided the hearsay fulfills *Comito* balancing. Moreover, the admission of hearsay evidence falling within an exception against a criminal defendant is not a foregone conclusion; all hearsay evidence is subject to Fed. R. Evid. 403 balancing (whether the evidence is more prejudicial than probative). The Federal Rules of Evidence, and such prejudicial/probative weighing, do not govern parole revocation hearings . . . and therefore do not protect parolees as they do criminal defendants.

(*Id*. at at pp. 990-991; accord, Evid. Code, § 352; *People v. Brown* (1989) 215 Cal.App.3d 452, 454 ["relaxed rules of evidence govern[ ] probation revocation proceedings"].)

Liggins found that "the paradigm shift brought about by *Crawford* is relevant to the treatment of testimonial hearsay wherever a constitutionally protected right of confrontation is at stake." (*People v. Liggins*, *supra*, 53 Cal.App.5th at p. 68.) As the court there explained:

> *Crawford*, it will be recalled, overruled *Ohio v. Roberts* (1980) 448 U.S. 56 . . . . Before *Crawford* was decided, state hearsay law often drove the Sixth Amendment analysis in confrontation clause cases involving testimonial hearsay, and *Roberts* was the avatar of that approach. Under *Roberts*, the availability of the Sixth Amendment right of confrontation was, in effect, dictated by the evidence concept of reliability. (*Roberts*, *supra*, at p. 66 [hearsay from an unavailable witness is admissible over a Sixth Amendment objection only if it bears adequate "'indicia of reliability'"; "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception"].) But "[r]eliability is an amorphous, if not entirely subjective, concept," the *Crawford* court explained. (*Crawford*, *supra*, 541 U.S. at p. 63.) And because "[t]here are countless factors bearing on whether a statement is reliable" (*ibid*.), *Crawford* held that the *Roberts* framework of analysis "is so unpredictable that it fails to provide meaningful protection from even core confrontation violations" (*ibid*.).
>
> In cases involving testimonial hearsay, we think there is no better justification for tying the availability of the due process right of confrontation to hearsay law than there is for the Sixth Amendment right. By doing so, *Stanphill* adopts the analytical framework of cases dating from the era when *Roberts*, *supra*, 448 U.S. 56 held sway. But the foundation for that approach was fundamentally undermined in *Crawford*. Arguably, we recognize, application of the *Arreola* balancing of interests test to spontaneous statement hearsay in the context of probation revocation is itself inconsistent with *Crawford*'s rationale because it simply trades one form of uncertainty for another. But even if that is so at some level, it is a form of uncertainty our Supreme Court chose in *Winson*

> and *Arreola* by establishing a case-by-case balancing test for the admissibility of hearsay offered in lieu of live testimony.

(*People v. Liggins*, *supra*, at pp. 68-69, fn. omitted.)

Liggins further noted that since "reliability bears directly upon the 'significance of the particular evidence [proffered] to a factual determination relevant to a finding of violation of probation' (*Arreola*, *supra*, 7 Cal.4th at p. 1160), it certainly has a place in the case-by-case weighing of interests required by *Arreola*. But it is only one of several factors to be weighed, and it must not be assigned dispositive weight in all cases to the exclusion of other factors – which is what *Stanphill* does by creating a categorical test that turns solely on Evidence Code section 1240. While, unquestionably, excited utterances may be uniquely valuable as a form of hearsay, that does not mean they must be treated as effectively irrebuttable." (*People v. Liggins*, *supra*, 53 Cal.App.5th at p. 69.)

Disagreeing with *Liggins*, the court here thought that in rejecting *Roberts* and changing the focus of the Confrontation Clause "from reliability to confrontation, *Crawford* rendered the Clause less suitable as a screen for reliable evidence. . . . 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 [for purposes of the due process right to confrontation]." (*People v. Gray*, *supra*, 63 Cal.App.5th at pp. 957-958, italics in original.)

To support the claim that *Crawford* has no useful bearing on the due process to be accorded in probation revocation hearings, the Court of Appeal cited *Whorton v. Bockting* (2007) 549 U.S. 406. (*People v. Gray*, *supra*, 63 Cal.App.5th at p. 957.) This conclusion draws no support from

Bockting. The issue in that case was whether *Crawford* established a "new rule" of criminal procedure, which would be retroactively applicable to cases final on direct appeal only if it was a "'watershed'" rule implicating the "'fundamental fairness and accuracy of the criminal proceeding.'" (*Whorton v. Bockting*, *supra*, at p. 416.) The high court explained that this exception was "'extremely narrow'" and required that the new rule be "necessary to prevent 'an "'impermissibly large risk'"' of an inaccurate conviction" as well as "'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" (*Id*. at pp. 417-418.)[7]

The *Bockting* court went on to hold that *Crawford* was not such a rule. The high court explained that "*Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of factfinding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. [Citation.]" (*Whorton v. Bockting*, *supra*, 546 U.S. at p. 419.) *Wharton* further noted that the results under the *Roberts* regime were generally consistent with the new rule announced in *Crawford*; the problem was that the rationale in those cases was faulty. (*Id*. at p. 417.) The high court added that "[i]ndeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay

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[7] The Court noted that *Gideon v. Wainwright* (1963) 372 U.S. 335, establishing the right to appointed counsel in most criminal cases, was the only instance in which a new rule had qualified under the "watershed" exception. (*Whorton v. Bockting*, *supra*, 546 U.S. at p. 419.)

statements. [Citation.] Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of factfinding in criminal cases is not easy to assess." (*Id*. at p. 419.) Thus, seen in its context, *Bockting* is clearly too flimsy a foundation to support the broad "new rule" proposed by the Court of Appeal.

In the present case, the court found that "[b]ecause the bodycam video is reliable enough to fall within the firmly rooted hearsay exception for excited utterances, the dictates of due process are satisfied." (*People v. Gray*, *supra*, 63 Cal.App.5th at p. 949.) This overly simplistic view cannot be sustained. As confirmed in *Arreola*, a defendant's right to confront and cross-examine testimonial evidence at a probation or parole revocation hearing "may not be dispensed with lightly" based on some amorphous conclusion that the hearsay testimony is reliable. (*People v. Arreola*, *supra*, 7 Cal.4th at p. 1158.) Hearsay evidence that endeavors to replace the live testimony of a witness is inadmissible absent a showing of the witness's unavailability or other good cause and a case-by-case balancing of the defendant's interest in confrontation against the government's good cause for denying it. (*Id.* at pp. 1159-1160; *People v. Winson*, *supra*, 29 Cal.3d at pp. 713-714.) The opinion of the Court of Appeal is contrary to the directions of this Court on how to handle out-of-court statements in probation revocation proceedings; it is also at odds with the Ninth Circuit's interpretation of the federal due process right to confrontation applicable at revocation proceedings. (See *Valdivia v. Schwarzenegger*, *supra*, 599 F.3d at p. 990 ["Reliability does not result in automatic admissibility: 'Simply because hearsay evidence bears some indicia of reliability does not render it admissible.' [Citation.] Therefore, evidence falling under a hearsay exception does not circumvent the *Comito* balancing test."]; *United States v.*

Hall (9th Cir. 2005) 419 F.3d 980, 988 [defendant's "otherwise strong interest in confrontation is somewhat lessened by the reliability of the hearsay evidence, but it is not defeated"].)

Given the *Crawford* court's view that the *Roberts* template, equating admissibility under the Sixth Amendment with reliability "is so unpredictable that it fails to provide meaningful protection from even core confrontation violations" (*Crawford v. Washington*, *supra*, 541 U.S. at p. 63), it is hard to imagine a convincing rationale for the Court of Appeal's conclusion that the admission of out-of-court testimonial evidence in a probation revocation hearing is perfectly acceptable. Far more convincing is the approach adopted in *Liggins* to harmonize the right of confrontation found in the Sixth Amendment with the confrontation right conferred by the Due Process Clause. "While the federal due process clause does not 'command' that testimonial hearsay must *always* be subjected to adversarial testing by cross-examination and face-to-face confrontation, as the Sixth Amendment does in the context of evidence presented at trial [citation], the paradigm shift brought about by *Crawford* is relevant to the treatment of testimonial hearsay wherever a constitutionally protected right of confrontation is at stake." (*People v. Liggins*, *supra*, 53 Cal.App.5th at p. 68, italics in original.) This approach, unlike that taken by the Court of Appeal, does no violence to *Arreola* and the *Morrissey* line of cases, while leaving the trial courts free to examine all the circumstances surrounding the proffered out-of-court statement to see if the fundamental fairness that is the touchstone of due process has been honored. (See *Gagnon v. Scarpelli*, *supra*, 411 U.S. at p. 790.)

In the present case, it seems self-evident that, where the complainant has partially recanted, the rudiments of fairness require that she be

subjected to face-to-face cross-examination and confrontation, so that the trier of fact can assess, on the basis of all available input, which of her conflicting versions is more reliable. Because the Court of Appeal has offered no persuasive reason to depart from the procedure laid down by this Court in *Arreola*, this Court should reverse the judgment.

CONCLUSION

For all the foregoing reasons, appellant respectfully requests this Court find the trial court violated appellant's due process right to confrontation by admitting the body camera video without first making a finding of good cause and determining whether a balancing of the interests under *Arreola* favored admission, and reverse the judgment.

Respectfully submitted,

William J. Capriola
Counsel for Appellant

WORD COUNT CERTIFICATE

Pursuant to rule 8.520(c) of the California Rule of Court, and in reliance on the word count of the computer program used to prepare this document, I hereby certify that this document contains 7,910 words, excluding the tables, cover information, signature block(s), quotation of issues, and this certificate. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Sebastopol, California, on December 6, 2021.

_____

William J. Capriola

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Re: *People v. Gray*, S269237

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 APPELLANT'S OPENING BRIEF ON THE MERITS on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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

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Calipatria, CA 92233

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William J. Capriola

STATE OF CALIFORNIA
Supreme Court of California

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