No. S269237

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

DONTRAE GRAY,
Defendant and Appellant.

Second Appellate District, Division Two, Case No. B302236
Los Angeles County Superior Court, Case No. MA065662
The Honorable Renee F. Korn, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Is a spontaneous statement within the meaning of Evidence Code section 1240 inherently reliable for purposes of due process and therefore admissible at a probation violation hearing without a further finding of good cause and balancing of factors?

INTRODUCTION

The Sixth Amendment right to confrontation applies at criminal trials, but not at subsequent hearings to revoke probation or parole. This does not mean that probationers and parolees have no right to confrontation whatsoever. Rather, it means that their right to confrontation derives from the due process right to reliable fact-finding on issues affecting their conditional liberty. Indeed, the United States Supreme Court has recognized that the due process right to confrontation is fundamentally different and less demanding than the Sixth Amendment right to confrontation. In particular, the right to confrontation at a probation or parole revocation hearing may be dispensed with for good cause. Moreover, the concept of good cause has a flexible meaning that allows the admission of various types of hearsay without cross-examination, particularly when such flexibility serves the ultimate goal of ensuring that probation and parole revocation decisions are based on reliable evidence.

At issue here is an audio-video recording made by a law enforcement officer's body camera. The recording captured statements that an alleged victim of domestic violence made within minutes of calling 911. The trial court determined, and

appellant Gray does not appear to dispute, that the statements satisfied the hearsay exception for "spontaneous statements" under Evidence Code section 1240. The question is whether that determination was sufficient by itself to satisfy the due process rule permitting the admission of hearsay without confrontation at a probation revocation hearing upon a showing of "good cause."

The lower appellate courts have split on that issue. Under one view, in addition to finding that the spontaneous statements hearsay exception applies, a court must find good cause *and* further must weigh the prosecution's need for the evidence against the defendant's need for confrontation before admitting the evidence. But that view relied upon a misreading of this Court's decision in *People v. Areolla* (1994) 7 Cal.4th 1144, a case in which no exception to the hearsay rule applied whatsoever. Under the better view, followed by the appellate court below, a determination that evidence is admissible under the hearsay exception for spontaneous statements is sufficient by itself to satisfy the flexible standard of good cause under the due process confrontation rule.

Both this Court and the United States Supreme Court have acknowledged that spontaneous statements are especially reliable. Indeed, the rationale for that exception is that such statements are often more trustworthy than trial testimony given weeks or years after an event. More importantly, whether more reliable or not, spontaneous statements are a qualitatively different type of evidence than—not a "weaker substitute for"—live testimony. Their value as evidence is independent of any live

testimony the declarant might give. For that reason, the hearsay rule has never required the proponent of a spontaneous statement to establish that the declarant was unavailable to provide live testimony. And, likewise, the due process clause should not be read to require the proponent of a spontaneous statement to make a further showing of good cause for not calling the declarant to provide live testimony at a probation or parole hearing.

LEGAL BACKGROUND

A. The due process right to confrontation at parole and probation revocation hearings

"[T]he revocation of parole [or probation] is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole [or probation] revocations." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 480; see *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782 & fn. 2 [probation revocation and parole revocation are "constitutionally indistinguishable"]; *People v. Arreola* (1994) 7 Cal.4th 1144, 1153.) This is so because parole occurs "after the end of the criminal prosecution." (*Morrissey*, *supra*, at p. 480.) And the revocation of parole "deprives an individual, not of the absolute liberty to which every citizen is entitled, but only the conditional liberty properly dependent on observation of special parole restrictions." (*Ibid.*) The same is true of probation, as the probationer has already been convicted of a crime after receiving, or waiving, the full panoply of trial rights, and enjoys only a

"conditional liberty" owing to an act of leniency by the court. (See *Gagnon, supra*, at p. 782 & fn. 2; *Arreola*, *supra*, at p. 1153.)[1]

Accordingly, as appellant Dontrae Gray concedes (OBM 12, fn. 3), the confrontation clause of the Sixth Amendment applicable to criminal trials is inapplicable to revocation hearings. (*People v. Stanphill* (2009) 170 Cal.App.4th 61, 78; *People v. Liggins* (2020) 53 Cal.App.5th 55, 64; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411.) Nevertheless, a probationer at a revocation proceeding is entitled to "the minimum requirements of due process." (*Morrissey*, *supra*, 408 U.S. at pp. 488-489.) This includes "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." (*Id.* at p. 489,; *Arreola, supra,* 7 Cal.4th at pp. 1152-1153.) Thus, the due process clause, not the confrontation clause, is the source of probationer's right to confront witnesses at a revocation hearing. (*Stanphill*, *supra*, at p. 78; *Liggins, supra,* at p. 64; accord, *Valdivia v. Schwarzenegger* (9th Cir. 2010) 599 F.3d 984, 989.)

The fundamental concern of due process at a revocation hearing is the reliability of factfinding.

> Both the probationer or parolee and the State have a continued post-conviction interest in accurate fact-finding and the informed use of discretion—the probationer or

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[1] Because the case law has uniformly deemed probation revocation to be indistinguishable from parole revocation for all purposes relevant here, this brief will refer to both types of proceedings as "revocation hearings" and to both probationers and parolees as probationers.

> parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

(*Gagnon*, *supra*, 411 U.S. at p. 785.)

Accordingly, the due process confrontation right is not absolute, but rather may yield to other interests so long as the evidence is sufficiently reliable. "[T]he process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." (*Morrissey*, *supra*, 408 U.S. at p. 489; *Arreola*, *supra*, 7 Cal.4th at p. 1153.) The United States Supreme Court has reiterated this principle and encouraged other creative solutions.

> While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States from . . . developing other creative solutions to the practical difficulties of the *Morrissey* requirements.

(*Gagnon*, *supra*, 411 U.S. at p. 782, fn. 5; accord *Arreola*, *supra*, 7 Cal.4th at p. 1153.)

B. This Court's decisions regarding admissibility of hearsay at revocation hearings

Applying these principles of due process, this Court addressed the admissibility of hearsay at revocation hearings in *People v. Maki* (1985) 39 Cal.3d 707. There, hotel and car rental receipts were admitted into evidence at a probation revocation hearing to prove that the defendant had traveled in violation of a

probation condition. (*Id*. at p. 709.) Addressing whether that evidence comported with the due process right to confrontation, this Court "first consider[ed] whether the evidence here admitted was in fact properly considered under pertinent exceptions to the hearsay rule. *If it was, then there is no need to inquire* as to whether and what flexible standards may be applied . . . ." (*Id*. at p. 710, italics added.) This Court concluded that no foundation had been laid for the business records (Evid. Code, § 1271) or adoptive admissions (Evid. Code, § 1221) exceptions to the hearsay rule. (*Maki, supra,* at pp. 710-713.) Only then did this Court turn to the secondary question of "whether the court could nonetheless properly consider the documents in determining whether to revoke defendant's probation." (*Id*. at pp. 713-714.) This Court ultimately concluded that the records were sufficiently reliable for admission. (*Id.* at pp. 714-717; see *In re Eddie M.* (2003) 31 Cal.4th 480, 501-502 [parenthetically describing *Maki* as "allowing admission of reliable records not subject to established hearsay exception"].)

This Court again addressed the admissibility of hearsay at revocation hearings in *Arreola*, *supra*, 7 Cal.4th 1144. There, the transcript of a deputy sheriff's preliminary hearing testimony was admitted into evidence at a subsequent probation revocation hearing. (*Id*. at p. 1150.) The People presented no explanation for failing to secure the deputy's presence at the new proceeding. (*Id*. at p. 1160.) Neither did the People show that the transcript

met any exception to the hearsay rule.[2] Applying the due process requirements of *Morrissey*, and relying on its prior decision in *People v. Winson* (1981) 29 Cal.3d 711, 717-719 [good cause required for the admission of a preliminary hearing transcript at a revocation hearing in lieu of live testimony], this Court held that due process did not permit the admission of the transcript without a showing of good cause. (*Arreola, supra*, 7 Cal.4th at pp. 1157-1158.) This Court held that "good cause" is met in that context: "(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." (*Arreola*, *supra*, 7 Cal.4th at p. 1160.) Additionally, the court must balance the defendant's need for confrontation against the need to dispense with confrontation, by considering such factors as the purpose for which the evidence is offered, the significance of the evidence to an issue of fact relevant to a finding of a probation violation, and the existence of other admissible evidence corroborating the hearsay evidence of the probation violation. (*Id*. at p. 1160.)

The Court explained that "'former testimony is often only a weaker substitute for live testimony. It seldom has independent

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[2] The hearsay exception for former testimony did not apply in *Arreola* because the People did not show the witness was unavailable to testify, a prerequisite for that exception. (Evid. Code, § 1291, subd. (a).)

evidentiary significance of its own, but is intended to replace live testimony.'" (*Arreola*, *supra*, 7 Cal.4th at pp. 1158, quoting *United States v. Inadi* (1986) 475 U.S. 387, 394.) The Court added, "'If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version.'" (*Arreola*, *supra*, at pp. 1158-1159, quoting *Inadi*, *supra*, 475 U.S. at p. 394.)

C. Division of authority on admissibility of spontaneous statements

A division of authority has arisen among the appellate courts regarding the admissibility, at revocation hearings, of statements meeting the hearsay exception for spontaneous statements (Evid. Code, § 1240).

The exception applies to a statement that "(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) For a statement to qualify under this exception:

> (1) [T]here must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.

(*People v. Poggi* (1988) 45 Cal.3d 306, 318, internal quotation marks and citations omitted.) The exception applies regardless of whether the declarant is available to provide live testimony. (*People v. Anthony O.* (1992) 5 Cal.App.4th 428, 436; *People v. Hughey* (1987) 194 Cal.App.3d 1383, 1392-1393.)

Two California appellate decisions, *Stanphill*, *supra*, 170 Cal.App.4th 61, 81, and the current underlying opinion, *People v. Gray* (2021) 63 Cal.App.5th 947, 953-955, held that so long as a statement satisfies the requirements of Evidence Code section 1240, it is admissible at a revocation hearing without an additional showing of good cause or balancing of interests.

Stanphill observed that spontaneous statements "are a special breed of hearsay exception" that automatically satisfy the "good cause" required by due process under *Morrissey*. (*Stanphill*, *supra*, 170 Cal.App.4th at p. 81.) Because such statements are made under the stress of excitement, with no opportunity to contrive or reflect, they are "*particularly* likely to be truthful." (*Ibid.*, original italics.) Indeed, they are "'better than is likely to be obtained from the same person upon the stand.'" (*Ibid*, quoting *Hughey*, *supra*, 194 Cal.App.3d 1383, 1392-1393, 6 Wigmore, Evidence (Chadbourn ed. 1976) § 1748, p. 199.) Thus, under the *Stanphill* court's analysis, the uniquely valuable nature of spontaneous statements creates good cause, per se, for their admission as hearsay. (*Stanphill, supra,* at p. 81; accord *State v. Martin* (2020) 313 Or.App. 578 [496 P.3d 1077] [by meeting the excited utterances exception to the hearsay rule, domestic violence victim's statements in 911 call were sufficiently

trustworthy to satisfy per se the due process requirements for admission at a revocation hearing without a further showing of good cause], review granted, 368 Or. 787 [498 P.3d 807] (Table).)

The *Gray* decision below took a broader view than did *Stanphill*, holding that evidence meeting *any* "firmly rooted" hearsay exception satisfies due process under the "flexibility" permitted by *Morrissey*, without need for a further showing of good cause or a balancing of interests. (*Gray, supra*, 63 Cal.App.5th at p. 953.) The *Gray* court's reasoning was twofold. First, the court opined that "this is the rule most consonant with the purpose and function of due process" namely, "to guarantee an accurate determination of innocence or guilt." (*Ibid*., internal quotation marks omitted.) *Gray* explained that due process demands reliability of the evidence considered by the trier of fact in order to assure the reliability of verdicts. (*Id*. at p. 954) "Because out-of-court statements that fall within a firmly rooted hearsay exception are, by definition, reliable [citation], 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." (*Id*. at p. 954, citing *Ohio v. Roberts* (1980) 448 U.S. 56, 66, overruled on other grounds by *Crawford v. Washington* (2004) 541 U.S. 36.)

Second, *Gray* reasoned that its rule was most consistent with California precedent. *Gray* cited this Court's observation in *Maki* that when proffered evidence meets a pertinent hearsay exception, no further inquiry into its reliability is necessary for its admission under the "flexible" due process standards

applicable to revocation hearings. (*Gray*, *supra*, at p. 955, citing *Maki*, *supra*, 39 Cal.3d at p. 710.) Like *Stanphill*, the *Gray* court noted that no California decision—including *Arreola*—had ever applied the good cause and balancing requirement to evidence meeting a hearsay exception. (*Gray*, *supra*, at pp. 954-955; accord *Stanphill, supra*, 170 Cal.App.4th at pp. 79-80 ["It is an open question as to whether the court must perform the balancing test when evidence is admissible under an established hearsay exception."].)

However, *Liggins*, *supra*, 53 Cal.App.5th 55, reached a conclusion contrary to *Stanphill* and *Gray*. *Liggins* held that a spontaneous statement, like any other hearsay, is inadmissible at a revocation hearing unless the prosecution shows good cause and the court conducts the balancing test described in *Arreola*. (*Id.* at pp. 59, 66-69.) *Liggins* reasoned that "it is contrary to . . . *Arreola* . . . to treat Evidence Code section 1240 as an automatically applicable proxy for compliance with due process minima." (*Id.* at p. 67.) Stressing the importance of face-to-face confrontation, *Liggins* concluded that reliability of a hearsay statement is insufficient, by itself, to justify admissibility at a probation violation hearing. The *Liggins* court read this Court's *Maki* decision as suggesting only that "documentary evidence" meeting a hearsay exception can automatically satisfy the good cause requirements. (*Maki*, *supra*, at p. 66.)

Decisions from the federal appellate courts exhibit similar tension. The Second Circuit Court of Appeals has held that a statement meeting the "excited utterances" exception to the

federal hearsay rule is admissible at a federal supervised release revocation hearing without a determination of unavailability or a balancing of the releasee's right to confrontation against the government's grounds for not permitting confrontation. (*United States v. Jones* (2d Cir. 2002) 299 F.3d 103, 113.)[3] The *Jones* court distinguished its own prior decision requiring witness unavailability and balancing of interests (*United States v. Chins* (2d Cir. 2000) 224 F.3d 121), on the ground that the hearsay in its prior decision was not shown to meet any exception to the hearsay rule. (*Jones*, *supra*, at p. 113.)

However, the Ninth Circuit Court of Appeals has reached a contrary conclusion, albeit in a case not specifically addressing spontaneous statements. In *Valdivia v. Schwarzenegger* (9th Cir. 2010) 599 F.3d 984, a federal lawsuit raising a procedural due process challenge to California's parole revocation system, the majority opinion rejected the State's argument that any hearsay meeting a "traditional or long-standing" hearsay exception may be admitted at a revocation hearing without undergoing the *Comito* balancing test.[4] (*Id.* at pp. 989-991 (maj. opn.).)

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[3] Under the Federal Rules of Evidence, "The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: [¶] . . . (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." (Fed. Rules Evid., rule 803.)

[4] *United States v. Comito* (9th Cir. 1999) 177 F.3d 1166, 1170, requires a "due process balancing test" before otherwise inadmissible hearsay evidence can be admitted at a federal revocation hearing. The test requires a court to "weigh the

(continued…)

However, a dissenting opinion urged that the majority opinion would incongruously grant parolees greater constitutional rights to confrontation than defendants in a criminal trial. In a criminal trial, the constitution prohibits only hearsay deemed "testimonial" under *Crawford*, while at a revocation hearing, the majority's interpretation would bar even non-testimonial hearsay unless the court finds good cause and *Comito* balancing favors its admission. (*Valdivia*, *supra*, at pp. 996-997 (dis. opn. of Noonan, J.).) A six-judge opinion dissenting from the denial of rehearing en banc in *Valdivia* noted the same incongruity, and proposed that *Comito* balancing and good cause be required only for the admission of testimonial hearsay at revocation hearings. (*Valdivia v. Schwarzenegger* (9th Cir. 2010) 623 F.3d 849, 851-855 (dis. opn. of Bea, J.).)

STATEMENT OF THE CASE

A. Gray commits domestic violence while on probation

Appellant Dontrae Gray was convicted in 2015 of assault with a deadly weapon (Pen. Code, § 245, subd.(a)(1)) with a great bodily injury enhancement (Pen. Code, § 12022.7, subd. (a)), and

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(…continued)

releasee's interest in his constitutionally guaranteed right to confrontation against the Government's good cause for denying it." (*Ibid*.) In *Comito*, as in *Arreola*, no exception to the hearsay rule was proffered for the evidence at issue, a probation officer's testimony about the statements of a key witness who failed to appear under subpoena. (*Id*. at p. 1168; see *id*. at p. 1171 [the officer's testimony "involved the least reliable form of hearsay"].)

was granted five years probation. (*Gray*, *supra*, 63 Cal.App.5th at p. 950; 1CT 57-60, 84-87.)

On March 30, 2019,[5] Los Angeles Police Officer Manuel Madueño and other officers went to an apartment in Los Angeles in response to a 911 call made only a few minutes earlier. (*Gray, supra*, 63 Cal.App.5th at p. 950; 2RT 1813, 1817-1818, 1821-1822.) Natosha S. and another woman were in the apartment. (2RT 1829-1830.) The living room "was pretty trashed." The apartment door and its frame were broken. (2RT 1829-1833.) Natosha had bruises, was breathing heavily, and appeared to be afraid to talk. (2RT 1833, 1837.) Officer Madueño photographed her injuries. (2RT 1833-1836.)

In statements video recorded on an officer's body camera, Natosha told Officer Madueño that she was Gray's girlfriend and that Gray had just "kicked in this door . . . and just starting, um, . punching me everywhere. . . . Stomping me out." (2CT 288; see 2RT 1819, 1823-1825, 1828.)

Three days later, Natosha recanted, telling a detective that she had been injured because she fell down when Gray kicked the door open, and that the reason she had accused Gray of hitting her was because she was angry. (2RT 2103-2104.) In a phone call with the prosecutor before the first preliminary hearing, Natosha said, "I'm lying about some things." (2RT 2104-2105.)

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[5] The opinion below misstates the date of the incident as 2018. (*Gray*, *supra*, 63 Cal.App.5th at p. 950.) The prosecutor made two similar misstatements at the hearing. (2RT 1815.)

B. The court admits Natosha's video recorded spontaneous statement into evidence at the probation revocation hearing

The People sought to revoke probation, alleging that Gray had committed first degree burglary (Pen. Code, § 459) and corporal injury on a spouse or coinhabitant (Pen. Code, § 273.5). One piece of prosecution evidence at the revocation hearing was the body camera recording of Natosha's statement. Gray objected to that evidence on hearsay, due process, and confrontation clause grounds. (2RT 1820, 1822, 2102, 2105.)[6]

The trial court examined the video recording and ruled that a portion of Natosha's statements would be admissible at the revocation hearing under the hearsay exception for spontaneous statements (Evid. Code, § 1240). (2RT 317, 1203-1204, 1206, 1208-1209, 2102-2103, 2106-2107, 2110-2111.) The court ruled that the statements were not barred by *Crawford, supra*, 541 U.S. 36, because *Crawford* was based on the confrontation clause of the Sixth Amendment, which did not apply to revocation hearings. (2RT 902-904.) The court then considered the confrontation principles embodied in the due process clause, and, citing *Stanphill*, *supra*, determined that the statements were sufficiently reliable to satisfy due process. (2RT 903-904, 1209-

[6] The People initially filed new criminal charges against appellant based on the same incident. Those charges were dismissed after the trial court ruled that the Sixth Amendment confrontation clause precluded admission of the same recorded statement at issue here. (*Gray*, *supra*, 63 Cal.App.5th at pp. 950-951.)

1210, 1820, 1822-1823, 2111, 2117.) The court found a probation violation, revoked probation, and executed a previously-stayed seven-year prison sentence. (2CT 291-295.)

The Court of Appeal affirmed the judgment in a published opinion, for the reasons discussed *ante*. (*Gray, supra,* 63 Cal.App.5th at pp. 951-957.)

SUMMARY OF ARGUMENT

Probationers at revocation hearings are not entitled to the full array of constitutional rights available to defendants at criminal trials, including the confrontation clause of the Sixth Amendment. This is so because probationers, having been validly convicted of crimes, have already been afforded the full panoply of constitutional trial rights in the criminal proceedings that resulted in their convictions.

As a matter of due process, however, a less stringent confrontation rule applies at revocation hearings. The United States Supreme Court and this Court have described that right as "flexible." Its ultimate purpose is to promote the accuracy and reliability of the factfinding on which revocation decisions are based. In keeping with that flexibility, California courts have permitted the admission of hearsay at revocation hearings *that would not have been admissible in a criminal trial*, so long as the hearing court finds good cause and balances the People's interest in presenting the hearsay against the probationer's interests in confrontation.

Thus far, this Court has never required a showing of good cause or balancing of interests as prerequisites for admitting out-

of-court statements that meet an exception to the hearsay rule. To the contrary, this Court has suggested that so long as a hearsay exception applies, no further inquiry is needed to protect due process.

This Court should hold that evidence meeting the hearsay exception for spontaneous statements under Evidence Code section 1240 is admissible at revocation hearings without a further finding of good cause or balancing of interests. Such statements are not offered as a "substitute for live testimony" but rather as a unique type of evidence, categorically different from—and often more trustworthy than—live testimony. Because a spontaneous statement, by definition, is made under the stress of excitement caused by the event it describes, before the declarant has an opportunity to reflect or fabricate, it is an irreplaceable snapshot of a moment in time. The unique value of such evidence gives rise to "good cause" per se for its admission, regardless of the availability of the declarant. This is particularly so given the flexible nature of the due process rule under which confrontation may yield to the interest of reliable factfinding at a revocation hearing.

ARGUMENT

I. THE DUE PROCESS RIGHT TO CONFRONTATION AT REVOCATION HEARINGS IS MORE FLEXIBLE THAN THE SIXTH AMENDMENT AND SERVES A DIFFERENT PURPOSE

The confrontation clause of the Sixth Amendment, applicable to criminal trials is fundamentally different from the confrontation rule required by the due process clause at revocation hearings. The Sixth Amendment creates a right to

confrontation as an end in itself, not merely as a tool for achieving reliable verdicts. "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, 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.) Reliability was once regarded as the touchstone of the confrontation clause. (*White v. Illinois* (1992) 502 U.S. 346, 356 ["where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied"]; *Ohio v. Roberts* (1980) 448 U.S. 56, 65-66 [a "firmly established hearsay exception" conveys sufficient "indicia of reliability" to comport with the confrontation clause].) But that view has now been abandoned with respect to the Sixth Amendment. (See *Crawford*, *supra*, at pp. 61-65 [rejecting the reliability-centered approach to the confrontation clause in *Roberts*].)

In contrast to the Sixth Amendment, trustworthiness of evidence and reliability of factfinding remain the touchstone of the due process confrontation rule. When the United States Supreme Court first set forth the procedures for revocation hearings demanded by due process, it did so for the purpose of serving both the government's and the probationer's interests in accurate fact-finding and the informed use of discretion. (*Gagnon, supra*, 411 U.S. at p. 785.) Confrontation was merely a tool for achieving the goal of reliability. Thus, the high Court

signaled from the outset that the due process confrontation rule must be "flexible" enough to accommodate conventional types of hearsay evidence *that would not be admissible in a criminal trial*, and can be dispensed with altogether for "good cause." (*Morrissey*, *supra*, 408 U.S. at p. 489, italics added; accord, *Gagnon, supra*, 411 U.S. at p. 782, 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"]; *Arreola*, *supra*, 7 Cal.4th at p. 1153.) Moreover, evidence that *would* be admissible at a criminal trial generally does not violate due process. (See *People v. Merriman* (2014) 60 Cal.4th 1, 64 ["Because the evidence was properly admitted under Evidence Code section 1240, its admission did not deprive defendant of due process."]; *People v. Riccardi* (2012) 54 Cal.4th 758, 809, ["The routine and proper application of state evidentiary law does not impinge on a defendant's due process rights."], abrogated on another ground by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Clear reasons exist for this dichotomy between Sixth Amendment trial rights and the less stringent due process rights at revocation hearings. Probationers do not stand in the same shoes as defendants in criminal proceedings. Criminal defendants face the deprivation of their liberty, and are therefore entitled to the full array of trial rights, including not only confrontation but also trial by jury and the reasonable doubt standard. Probationers, in contrast, have already been afforded those rights and have lost their liberty due to presumptively valid

convictions. They remain outside of custody only conditionally, and their probation or parole can be revoked if they violate the terms of their release. (*Morrissey, supra,* 408 U.S. at p. 480 ["Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions."]; *Jones*, *supra*, 299 F.3d at p. 109 ["The Supreme Court does not, however, attach to revocation proceedings the full range of procedural safeguards associated with a criminal trial because a probationer already stands convicted of a crime," internal quotations omitted].)

In sum, confrontation rights at revocation hearings must be more flexible than at criminal trials and should yield particularly to permit the admission of highly trustworthy forms of evidence that would promote the reliability of factfinding.

II. SPONTANEOUS STATEMENTS ARE A UNIQUE AND DISTINCTLY RELIABLE TYPE OF EVIDENCE, WHICH SATISFIES DUE PROCESS AT REVOCATION HEARINGS WITHOUT THE NEED FOR FURTHER INQUIRY

As the United States Supreme Court noted, spontaneous statements are especially reliable because they "are made in contexts that provide substantial guarantees of their trustworthiness." (*White*, *supra*, 502 U.S. at p. 355 [permitting spontaneous statements in criminal trials under a pre-*Crawford* confrontation clause analysis, without a showing of the declarant's unavailability].)[7] "A statement that has been offered

[7] The Illinois spontaneous statement exception addressed in *White* applies to "[a] statement relating to a startling event or (continued…)

in a moment of excitement—without the opportunity to reflect on the consequences of one's exclamation—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom." (*Id.* at p. 356.)

A spontaneous statement that meets the requirements of Evidence Code section 1240 "is considered trustworthy . . . despite its hearsay character, because in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief." (*Merriman*, *supra*, 60 Cal.4th at p. 64, citations and internal quotation marks omitted; accord, *People v. Clark* (2011) 52 Cal.4th 856, 925; *People v. Farmer* (1989) 47 Cal.3d 888, 903-904, disapproved on other grounds by *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)

But the heightened reliability of spontaneous statements is not the only rationale for exempting such evidence from the hearsay rule. Another key reason for their admissibility is that they are wholly different in kind from live testimony. They are not merely satisfactory "substitutes" for live testimony, but are a distinct form of evidence that benefits factfinders in a way that

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(…continued)

condition made while the declarant was under the stress of excitement caused by the event or condition." (*White*, *supra*, 502 U.S. at p. 350, fn. 1, citing *People v. White* (1990) 198 Ill.App.3d 641, 648 [555 N.E.2d 1241, 1246].) It is therefore essentially the same as California's exception. (Evid. Code, § 1240; *Poggi*, *supra*, 45 Cal.3d at p. 318.)

live testimony cannot. Spontaneous statements provide a rare snapshot of a past moment in time, when the event described is fresh and raw and the declarant has had neither the time nor the mental composure to reflect, fabricate, or forget. In effect, live testimony is an inadequate substitute for spontaneous statements, rather than the converse, because they are qualitatively different. (See *White*, *supra*, at pp. 355-356 ["But those same factors that contribute to the statements' reliability cannot be recaptured even by later in-court testimony."].)

Because of the distinct qualities of spontaneous statements, their admission at revocation hearings is consistent with the *Morrissey* confrontation rule in two alternative ways: via the "good cause" exception, or via the flexibility of due process recognized by the high court. (*Morrissey, supra*, 408 U.S. at p. 489.)

First, spontaneous statements inherently meet the "good cause" exception to the confrontation requirement. (See *Morrissey*, *supra*, 408 U.S. at p. 489 [confrontation rule applies to revocation hearings "unless the hearing officer specifically finds good cause for not allowing confrontation"].) As our courts have explained, "a necessity or expediency arises for resorting to" evidence of spontaneous statements, because "'we cannot expect, again, or at this time, to get *evidence of the same value* from the same or other sources,'" including the declarant's own potential testimony on the witness stand. (*Stanphill*, *supra*, 170 Cal.App.4th at p. 81, quoting 5 Wigmore, Evidence (Chadbourn ed.1974) § 1421, p. 253, italics in original; *Hughey, supra,* 194

Cal.App.3d at pp. 1392-1393.) In other words, the unique benefit of spontaneous statements, which cannot be obtained from live trial testimony, constitutes "good cause" for their admission.

Accordingly, "good cause" for *Morrissey* purposes should not be limited to the unavailability of the declarant, or its practical equivalent. In a different context—the admission of a transcript of prior testimony—this Court held that the "broad standard" of "good cause" is met when the declarant is legally unavailable or cannot be brought to the hearing without great difficulty, expense, or risk of harm to the declarant. (*Arreola*, *supra*, 7 Cal.4th at p. 1160.) But *Arreola* did not purport to limit or define "good cause" under *Morrissey* for all contexts.[8] It would make little sense to require the declarant's unavailability in the context of spontaneous statements, as, unlike prior testimony or other forms of hearsay, they are not offered as "substitutes for live testimony" and their value as evidence has nothing to do with the availability of the declarant to testify. Neither would it make sense to require good cause to be established case-by-case for each particular spontaneous statement *in addition to* demonstrating that the statement meets the requirements of Evidence Code section 1240. The latter already amounts to a

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[8] The precise issue addressed by *Arreola* was whether the People complied with "good cause" by notifying the defense in advance that the preliminary hearing testimony would be offered at the probation revocation hearing, giving the defense the same motivation to cross-examine the witness. (*Arreola*, *supra*, 7 Cal.4th at p. 1148, 1156.) This Court held that this did not amount to good cause. (*Id*. at pp. 1156, 1159-1161.)

particularized finding of the statement's unique evidentiary quality, the good cause for its admission. An additional "good cause" determination would be superfluous.

Second, the admissibility of spontaneous statements is consistent with the "flexible" property of due process at revocation hearings recognized by *Morrissey*. As the high court has explained, "[T]he process should be flexible enough to consider evidence including letters, affidavits, and other material that would *not be admissible* in an adversary criminal trial" (*Morrissey*, *supra*, 408 U.S. at p. 489, italics added) and should accommodate "the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence," as well as "other creative solutions to the practical difficulties of the *Morrissey* requirements" that the states may develop (*Gagnon*, *supra*, 411 U.S. at p. 782, fn. 5). If the due process confrontation rule can be flexible enough to permit evidence that would be inadmissible at trial, all the more so must it accommodate evidence that would be fully admissible at trial under the spontaneous statements hearsay exception.

Appellant Gray argues that the reliability of spontaneous statements has been exaggerated by "the folk psychology of evidence," and he refers to studies showing that lies can be fabricated quickly even under stress. (OBM 22-23.) But respondent does not claim that spontaneous statements are always, infallibly *more* accurate or reliable than live testimony, but rather that they are qualitatively *different* from live testimony—not a mere substitute therefor. The ability to cross-

examine a witness and observe the witness's demeanor in court are highly valuable, but spontaneous statements provide a different value that live testimony and confrontation simply cannot match—the declarant's raw, unscripted, and unfiltered impressions at or close to the time of the event, given without reflection. That qualitative difference between spontaneous statements and live testimony supplies the good cause for admitting the latter under the flexible standards of due process at a revocation hearing.

III. THE FLEXIBILITY OF THE DUE PROCESS CONFRONTATION RULE IS NOT LIMITED TO DOCUMENTARY EVIDENCE

Gray attempts to draw a distinction between "documentary" and "non-documentary" hearsay, arguing that "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." (OBM 24.) Gray further claims that *Arreola* drew such a distinction when it distinguished *Maki*.

To the contrary, nothing in *Maki* suggests that the admissibility of evidence meeting a "pertinent hearsay exception" is limited to documents, nor did *Arreola* place such a limitation on *Maki*. Rather, the key distinction made by *Arreola* was not between hearsay that is written on paper and hearsay relayed

orally by a secondhand witness in court,[9] but rather between documentary evidence and hearsay offered as the functional equivalent of live testimony—most specifically, a transcript of prior testimony. *Arreola* did not suggest any distinction between "documentary evidence" and the type of evidence at issue here—hearsay that, like documentary evidence, has value independent of any live testimony the declarant might give.

Distinguishing *Maki*, *Arreola* explained:

> 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.]

(*Arreola, supra*, at p. 1157.)

Hence, *Arreola* distinguished "traditional 'documentary' evidence" from evidence that "ha[s], as its source, live testimony." But like documentary evidence, spontaneous statements do not have, as their source, live testimony. Instead, they have, as their source, out-of-court remarks uttered under the dominance and stress of excitement while the declarant lacks the time or

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[9] Notably, the current case involves neither. The hearsay was presented in court in the form of body-camera video of the declarant herself, recording her statements in real time. Hence, there was no dispute that Natosha actually made the statements, and the factfinder was able to observe her demeanor as she made them.

reflective powers to contrive and misrepresent. (Evid. Code, § 1240; *Poggi*; *supra*, 45 Cal.3d at p. 318.)

The reasoning of *Arreola* relates very specifically to prior testimony. The chief difference between prior testimony and live testimony is that the latter is presented in real time, enabling the factfinder to observe the witness's demeanor, while the former is not. Hence, *Arreola* noted, prior testimony is undeniably "a weaker substitute for live testimony," and thus when the witness is available to testify live, there is little if any justification in relying on the weaker version. (*Arreola*, *supra*, 7 Cal.4th at pp. 1158-1159, citing *Inadi*, *supra*, 475 U.S. at pp. 394-395.) But as noted, spontaneous statements are not the equivalent of prior testimony, but a different breed of evidence altogether—perhaps more akin to documentary evidence in that they present a snapshot of a prior moment in time. The value of spontaneous statements is independent of any live testimony the declarant could provide in court. In short, *Arreola* distinguished *Maki* not because *Maki* addressed documentary evidence but because *Arreola* addressed prior testimony.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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April 6, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains 6,111 words.

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April 6, 2022

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Dontrae Gray** No.: **S269237**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On April 6, 2022, I electronically served the attached **ANSWER BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on April 6, 2022, I caused a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013-1230, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on April 6, 2022, at Los Angeles, California.

E. Obeso
Declarant

/s/ E. Obeso
Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. GRAY**
Case Number: **S269237**
Lower Court Case Number: **B302236**

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