No. 10-848

In The Supreme Court of the United States

ARNOLD SCHWARZENEGGER, et al.,

Petitioners,

v.

JERRY VALDIVIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do parolees in state administrative revocation hearings have a due process "confrontation right" to exclude hearsay, in the absence of a special showing of "good cause," when that hearsay would be admissible under the Confrontation Clause even against a defendant in a criminal prosecution?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are Arnold Schwarzenegger, in his official capacity as Governor of the State of California, and the California Department of Corrections and Rehabilitation.

Respondents are Jerry Valdivia, Alfred Yancy, and Hossie Welch, representing a class of California parolees.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Governor Arnold Schwarzenegger and the California Department of Corrections and Rehabilitation (the State Defendants), respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-32a) is reported at 599 F.3d 984 (9th Cir. 2010). The order denying the State Defendants' petition for rehearing en banc and dissenting opinion (App., *infra*, 80a-92a) are reported at 623 F.3d 849 (9th Cir. 2010). The Special Master's Report and Recommendation Regarding Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction, including the exhibits thereto (App., *infra*, 33a-76a), and the district court's Order Adopting Findings and Recommendations of the Special Master (App., *infra*, 77a-79a), are reported at 548 F. Supp. 2d 852 (E.D. Cal. 2008).

STATEMENT OF JURISDICTION

The original judgment of the court of appeals was entered on March 25, 2010, and the order and decision denying the petition for rehearing en banc was

entered on September 28, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

1. In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), this Court held that, under the Fourteenth Amendment's Due Process Clause, parolees are entitled to a hearing before having their parole revoked. *Morrissey* identified, as among the minimum requirements to satisfy due process, a "right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Id.* at 489. These minimum requirements were designed "to assure that the finding of a parole violation will be based on verified facts." *Id.* at 484. But this Court emphasized that parolees are not entitled to the full panoply of rights afforded criminal defendants, and that "there is no thought to equate [the revocation hearing] to a criminal prosecution in

any sense." *Id.* at 480, 489. Accordingly, "the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Id.* at 489.

The following Term, in *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), this Court explained, in the context of recognizing similar limited rights for probationers, "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." *Id.* at 782.

2. In March 1994, respondent Jerry Valdivia, a California parolee, filed suit in the United States District Court for the Eastern District of California against the Governor of California, the California Department of Corrections and Rehabilitation (CDCR), various CDCR officials, and the California Board of Parole Hearings (formerly the Board of Prison Terms) and its officials. Valdivia alleged that California's parole-revocation procedures violated his rights under the Fourteenth Amendment's Due Process Clause as defined in *Morrissey* and *Gagnon*. The case was certified as a class action.

In June 2002, the district court granted partial summary judgment in favor of the plaintiff class, holding that California's parole-revocation system violated due process under *Morrissey*, *Gagnon*, and related authority. *Valdivia* v. *Davis*, 206 F. Supp. 2d 1068, 1078 (E.D. Cal. 2002). Following this determination,

the parties agreed to a stipulated permanent injunction, which the district court entered in March 2004. Paragraph 24 of the injunction provided that: "[t]he use of hearsay evidence shall be limited by the parolees' confrontation rights in the manner set forth under controlling law as currently stated in *United States* v. *Comito*, 177 F.3d 1166 (9th Cir. 1999)." Under *Comito*, to determine "whether the admission of hearsay evidence violates the releasee's right to confrontation in a particular case, the court must weigh the releasee's interest in his constitutionally guaranteed right to confrontation against the Government's good cause for denying it." *Id.* *Comito* points to two factors that are important when weighing an individual's right to confrontation: "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.* If a parolee can show that the hearsay at issue is significant in proving the violation and that it is not reliable, then the government is called upon to show good cause for not producing the witness. *Id.* at 1172.

The difficulty and expense of procuring witnesses (mere inconvenience or expense may be enough), and the traditional indicia of reliability borne by the evidence are factors in determining the government's good cause. *Id.*

3. Subsequently, the Ninth Circuit issued an opinion in *United States* v. *Hall*, 419 F.3d 980 (2005), stating that, "long-standing exceptions to the hearsay rule that meet the more demanding requirements for

criminal prosecutions should satisfy the lesser standard of due process accorded the respondent in a revocation proceeding." *Hall*, 419 F.3d at 987 (citing *Morrissey*, 408 U.S. at 489). In August 2007, the parties determined to seek clarification of the state of the law, and agreed under the provisions of a stipulation in the case to present the issue to the court-appointed special master. In October 2007, the plaintiff-class filed a motion with the special master, seeking to find the State Defendants in violation of Paragraph 24 of the injunction. Two issues concerning hearsay were identified: (1) whether hearsay-rule exceptions obviate the requirement to perform *Comito*'s good-cause balancing; and (2) whether, in determining the admissibility of hearsay evidence, *Comito* permits consideration of other hearsay evidence in the balancing process.

After briefing and a hearing, the special master in 2008, recommended that the State Defendants not be found in violation of the injunction. App., *infra*, 67a. The special master acknowledged that "[n]either the Supreme Court nor the Ninth Circuit has ruled directly on whether hearsay exceptions obviate the need for a balancing test in parole revocation hearings." App., *infra*, 46a. On the hearsay issues, however, the special master determined that: (1) hearsay exceptions do not eliminate having to engage in *Comito*'s good-cause balancing; and (2) other hearsay cannot be considered when determining whether a piece of hearsay may be admissible under *Comito* balancing, unless it too has satisfied *Comito*. App., *infra*, 60a & 65a. The special master also determined

that the "reliability of the hearsay is not a factor in determining whether the state had good cause not to produce a witness." App., *infra,* 70a.

Over the State Defendants' objections, the district court issued an order fully adopting the Report's conclusions and recommendations. App., *infra*, 77a-79a. The State Defendants appealed to the Ninth Circuit.

4. In a 2-1 published opinion, a Ninth Circuit panel affirmed the district court's order concerning hearsay procedures.[1] The panel majority (Hawkins, J., with M. Smith, J.) held that "[t]he law of this circuit is clear: the Comito test remains central to confrontation rights in parole hearings." App., *infra*, 8a. Thus, the panel majority determined that even when a hearsay statement falls within an enumerated hearsay exception so as to be admissible under the Confrontation Clause, California still must undertake *Comito*'s balancing test before relying on the statement in an administrative state parole-revocation hearing. Expressly acknowledging a contrary holding by the Second Circuit, the panel majority reiterated that "application of a balancing test to the admission of hearsay evidence in parole revocation hearings is not an open question in this circuit." App., *infra*, 11a

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[1] The Ninth Circuit Opinion was issued in two parts: Part I concerned the March 2008 order on the *Comito* issue that is the subject of this petition. Part II of the Opinion concerned issues unrelated to this petition (appeal no. 09-15836), and it was not the subject of the en-banc-review petition.

& n.4. The panel majority further held that the *Comito* rule extended even to hearsay evidence offered simply to meet the foundational requirement of *Comito*, i.e., merely to corroborate hearsay that was being offered. App., *infra*, 15a-19a.

The dissenting opinion (by Noonan, J.) rejected the majority's elevation of the rights of parolees in revocation proceedings above those of defendants in criminal proceedings. As the dissent explained, "By demanding that the state establish 'good cause' to rely on business records, excited utterances, and the like, the majority expands the confrontation rights of parolees beyond those held by criminal defendants." App., *infra*, 28a (Noonan, J., dissenting). The dissent further explained that principles of federalism preclude imposition of *Comito*'s balancing requirement "where no federal confrontation right is infringed," and where this Court has found that most traditional hearsay exceptions do not implicate the Sixth Amendment's Confrontation Clause. App., *infra*, 25a-27a (Noonan, J., dissenting). The dissent also rejected the majority's requirement that balancing be performed even for hearsay that is merely offered to corroborate the reliability of the proffered evidence. App., *infra*, 31a-32a (Noonan, J., dissenting). The dissent noted that trial judges are customarily free to consider inadmissible evidence offered only for the competence assessment of evidence proffered for admission, and that neither the Supreme Court nor the Ninth Circuit "has found this practice to contravene the minimum requirements of due process or to

require additional procedural safeguards." App., *infra*, 31a (Noonan, J., dissenting).

The Ninth Circuit denied the State Defendants' request for en banc review. But six judges dissented (Bea, J., with O'Scannlain, Tallman, Callahan, Ikuta, and N.R. Smith, JJ.). They observed that the "Ninth Circuit leaves in place a decision that affords greater due process protection as to evidence offered against parolees than as to evidence offered against criminal defendants." App., *infra*, 82a (Bea, J., dissenting). In particular, under the majority opinion, nontestimonial hearsay evidence that would be admissible in a criminal trial without any violation of the defendant's constitutional right would be inadmissible in a parole-revocation hearing unless the State shows "good cause" to admit the evidence under *Comito*. App., *infra*, 82a (Bea, J., dissenting). The dissent from en banc review also emphasized that the majority's decision squarely conflicted with the rule in the Second Circuit by rejecting the principle that "where the government proffers hearsay that would be admissible in a criminal proceeding under an established exception to the hearsay rule," no good-cause analysis is required. App., *infra*, 89a-90a (Bea, J., dissenting).

REASONS WHY THE PETITION SHOULD BE GRANTED

Introduction

By imposing stricter admissibility criteria on hearsay used in state parole-revocation hearings than the Confrontation Clause requires in criminal prosecutions, the Ninth Circuit's decision conflicts with *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). *Morrissey* was clear that "the revocation of parole 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 revocations." *Id.* at 480. Further, *Morrissey* explained that the process afforded parolees should not equate to or supersede the process afforded criminal defendants in any sense. *Id.*

As this Court has further clarified, the Sixth Amendment's Confrontation Clause governs only "testimonial" statements in criminal cases. *Whorton* v. *Bockting*, 549 U.S. 406, 420 (2007); see *Crawford* v. *Washington*, 541 U.S. 36, 61 (2004). The Ninth Circuit's decision in this case, however, now requires States to undertake special "good-cause" balancing in administrative parole hearings before admitting not only testimonial hearsay governed by the Confrontation Clause in criminal cases, but even nontestimonial hearsay beyond the scope of the Confrontation Clause and falling within the scope of traditional hearsay exceptions sanctioned as reliable. App., *infra*, 11a-13a. The "confrontation" rights afforded to parolees under the Fourteenth Amendment cannot be

greater than the confrontation rights afforded criminal defendants under the Sixth Amendment.

Further, the Ninth Circuit's decision directly conflicts with the rule in the Second Circuit. The Second Circuit holds that no good-cause analysis is required in a parole-revocation proceeding where the government proffers hearsay that would be admissible in a criminal proceeding under an "established exception to the hearsay rule." *United States* v. *Williams*, 443 F.3d 35, 45 (2d Cir. 2006). The Ninth Circuit opinion in this case held to the contrary: that evidence falling under a hearsay-rule exception, despite its admissibility in criminal prosecutions, does not relieve the States of meeting the good-cause balancing test the Ninth Circuit established for parole revocations in *Comito*. Only the Ninth Circuit has held that highly reliable evidence, such as a statement that falls under a traditional hearsay-rule exception, may not be used by the State unless it passes muster under a special balancing test. *Curtis* v. *Chester*, No. 09-3338, 2010 U.S. App. LEXIS 24172, at *11 (10th Cir. Nov. 24, 2010) (citing *Valdivia*, 599 F.3d at 990).

The Ninth Circuit's decision threatens criminal cases too, for it provides the platform for criminal defendants to argue for extending *Comito* balancing to criminal trials – not as a right of confrontation, but as a due-process right. The Ninth Circuit thus has made "due process" a fertile ground upon which criminal defendants may seek confrontation rights

beyond those accorded to them under the Sixth Amendment.

A. The Ninth Circuit Opinion Conflicts with this Court's Decision in *Morrissey* By Providing Greater Confrontation Rights to Parolees than the Constitution Affords to Criminal Defendants.

In *Morrissey*, this Court made it clear that, although a parolee is entitled not to have his parole revoked without due process, "the full panoply of rights due a defendant in [a criminal prosecution] does not apply to parole revocations." 408 U.S. at 480, 482. A revocation proceeding is not to be equated to a criminal prosecution in any sense. *Id.* at 489. So certainly – as this Court also has made clear – the minimum due process protections required in parole-revocation hearings cannot exceed the due process afforded to defendants in criminal proceedings. *Id.* Indeed, given the parolee's status as a convicted defendant in constructive custody, his parole-revocation procedural rights must be less.

Yet, in its opinion here, the Ninth Circuit provided greater "due process" to parolees concerning the admissibility of hearsay than the Constitution affords to criminal defendants at trial. The decision below imposes special and peculiar admissibility criteria limiting the State's use of nontestimonial or traditionally reliable hearsay in administrative state parole-revocation hearings, beyond any requirements

imposed on the government for use of testimonial hearsay against defendants in criminal prosecutions. Under the Ninth Circuit opinion, nontestimonial hearsay evidence, even such evidence that would qualify for admissibility under traditional hearsay-rule exceptions, must nonetheless be scrutinized under the *Comito* criteria – whereas the admissibility of the same evidence in a criminal proceeding would be a "foregone conclusion." App., *infra*, 28a-29a (Noonan, J., dissenting).

The Ninth Circuit's failure to abide by this Court's clear directive in *Morrissey*, that a parolee's due-process confrontation right should not be greater than a criminal defendant's Sixth Amendment confrontation right, is manifest in the comparison of the use of nontestimonial hearsay. Under *Valdivia*, nontestimonial hearsay in parole-revocation hearings is treated no differently than testimonial hearsay – it is admissible only after a unique and problematic balancing analysis. App., *infra*, 11a-15a. That same nontestimonial hearsay in a criminal prosecution, however, is exempt from Confrontation Clause scrutiny entirely. *United States* v. *Sine*, 493 F.3d 1021, 1035 n.11 (9th Cir. 2007) (citing *Whorton*, 549 U.S. at 420).

The Ninth Circuit's decision affords greater rights to parolees in yet a further respect. It requires *Comito* balancing for evidence used solely to corroborate other hearsay evidence, whereas the same evidence in criminal trials would routinely be considered to evaluate whether the proffered evidence should be

admitted. App., *infra*, 31a (Noonan, J., dissenting). In contrast, the Federal Rules of Evidence permit courts in criminal cases to consider inadmissible evidence on preliminary questions concerning such matters as witness qualification, the existence of privilege, and indeed, even the admissibility of evidence. Fed. R. Evid. 104(a).

The Ninth Circuit fully acknowledged that its decision in *Comito* "could be construed as going beyond the minimal requirements espoused in *Morrissey*." App., *infra*, 17a. Nevertheless, the Ninth Circuit then went even further, by extending *Comito*'s balancing analysis to hearsay that does not raise confrontation concerns, such as nontestimonial hearsay and foundational evidence.

The Ninth Circuit illogically attempted to justify its overstepping by citing its concern that some protections in criminal trials are not applicable in parole-revocation cases. But its explanation is a non sequitur. It is not the Ninth Circuit's role to re-adjust perceived procedural disparities that this Court and the Constitution have put in place.

It is also noteworthy that the special master's Report recommended, and the district court ordered, that "reliability of the hearsay is not a factor in determining whether the state had good cause not to produce a witness." App., *infra*, 70a. This particular conclusion, although not discussed by the Ninth Circuit below, conflicts with the basic goal of due process: to ensure a minimum level of reliability for

decisions impacting liberty or property. As this Court explained in *Morrissey*, the Fourteenth Amendment purpose of protecting a parolee's interest in confronting adverse witnesses "is to ensure reliability of evidence." *Morrissey*, 408 U.S. at 484 ("to assure that the finding of a parole violation will be based on verified facts"); see also *United States* v. *Taveras*, 380 F.3d 532, 536 (1st Cir. 2004) ("An important element of the good cause analysis is the reliability of the evidence that the Government seeks to introduce."); *Barnes* v. *Johnson*, 184 F.3d 451, 454 (5th Cir. 1999) ("An important consideration in this balancing is the reliability of the challenged testimony."); *United States* v. *Martin*, 382 F.3d 840, 846 (8th Cir. 2004) ("In determining the government's good cause in not producing a witness, we look to 'both the difficulty and expense of procuring witnesses and the traditional indicia of reliability borne by the evidence.' ").

The Ninth Circuit rule, however, violates the fundamental principle that reliability is the hallmark of due process. Instead, as the State Defendants advocated before the Ninth Circuit, basic reliability must be the lynchpin of any due-process right to challenge evidence in a parole-revocation proceeding. Thus, when out-of-court statements fall within a hearsay-rule exception, due-process reliability is obviously established because those exceptions have earned the imprimatur of legislatures and courts that over time, have recognized them as providing special trustworthiness with which due process is concerned.

That trustworthiness likely exceeds the minimum requirements of due process.

Evidence offering such reliability includes, at the least, conventional substitutes for live testimony such as affidavits, depositions, and documentary evidence – as identified by this Court in *Gagnon*, 411 U.S. at 782 n.5 – and statements falling under a traditionally established exception to the hearsay rule. See, *e.g.*, *Prellwitz* v. *Berg*, 578 F.2d 190, 193 (7th Cir. 1978) (holding evidence subject to business-records exception is reliable). They fulfill this Court's due-process mandate to ensure the reliability of evidence as set forth in *Morrissey*. The States should have the right to rely on reliable evidence in parole hearings – evidence such as statements falling within recognized exceptions to the hearsay rule – without regard to any further "good-cause" balancing analysis.

As recognized by Judge Noonan, the Ninth Circuit in this case, by requiring additional "good-cause" safeguards in parole-revocation hearings, "departs from Supreme Court precedent and exceeds [the Ninth Circuit's] limited authority to intervene in the criminal justice system of the fifty states." App., *infra*, 31a-32a (Noonan, J., dissenting). Similarly, as the Tenth Circuit has recognized, the Ninth Circuit in this case "counterintuitively grants parolees greater rights than the Constitution affords criminal defendants." *Curtis*, 2010 U.S. App. LEXIS 24172, at *11-12 n.3 (citing *Valdivia*, 623 F.3d 849). Simply put, the right to confront and cross-examine adverse witnesses cannot be given greater importance for a convicted

parolee who stands to be deprived only of conditional liberty, than for a presumptively innocent criminal defendant who stands to be deprived of absolute liberty. It is not within the Ninth Circuit's province to foist its view of confrontation in parole revocations on California, or any State within the circuit, in a way that exceeds the parameters of that right prescribed by this Court. The Ninth Circuit's opinion here did just that and thus contravenes *Morrissey*.

B. The Ninth Circuit Decision Has Created a Circuit Conflict on a Question of National Importance.

As the panel majority explicitly acknowledged, its decision to preclude the effect of hearsay-rule exceptions in parole-revocation hearings directly conflicts with the Second Circuit's holding that hearsay falling under a well-recognized exception need not be evaluated under a due-process balancing test because the evidence is sufficiently reliable. App., *infra*, 11a n.4 (citing *United States* v. *Williams*, 443 F.3d 35, 45 (2d Cir. 2006)); see also *United States* v. *Aspinall*, 389 F.3d 332, 344 (2d Cir. 2004). Further, in Judge Noonan's words, "The majority's headlong decision to create a circuit split is both unpersuasive and unnecessary." App., *infra*, 30a (Noonan, J., dissenting).

The Second Circuit squarely holds that, in a revocation hearing, "neither the Due Process Clause nor Rule 32.1 [of the Federal Rules of Criminal

Procedure] obliges the district court to perform a good-cause analysis with respect to a 'proffered out-of-court statement [that] is admissible under an established exception to the hearsay rule.'" *Williams*, 443 F.3d at 46 (citing *Aspinall*, 389 F.3d at 344); see also *United States* v. *Jones*, 299 F.3d 103, 114 (2d Cir. 2002) (holding that balancing analysis "is inapplicable where the out-of-court statement falls within an established exception to the hearsay rule"); see also *Gagnon*, 411 U.S. at 782 n.5 (emphasizing that in *Morrissey*, this Court did not intend to prohibit use of "conventional substitutes for live testimony").

Indeed, after *Comito*, the Ninth Circuit itself signaled support for an approach like that taken by the Second Circuit. In *Hall*, 419 F.3d 980, the Ninth Circuit suggested that hearsay subject to a traditional hearsay-rule exception need not be subjected to *Comito* balancing as a condition of admissibility – noting that "several pieces of evidence supporting the [parole-revocation charge] are admissible under hearsay exceptions." *Id.* at 987. *Hall* further proclaimed that "long-standing exceptions to the hearsay rule that meet the more demanding requirements for criminal prosecutions should satisfy the lesser standard of due process accorded the respondent in a revocation proceeding." *Id.* But the Ninth Circuit now has cast such reasoning aside. It emphatically pronounced *Comito* as the law for all of the states in the Ninth Circuit, applicable even to evidence historically admissible under traditional hearsay-rule exceptions,

and thus created a circuit conflict that this Court now should resolve. App., *infra*, 11a n.4.

A recent Tenth Circuit decision underscores the circuit conflict and the fact that *Valdivia* raises an issue of national importance. In *Curtis* v. *Chester*, the Tenth Circuit highlighted the Ninth Circuit's departure from Second Circuit precedent, and noted that "[o]nly the Ninth Circuit has expressly held highly reliable evidence (such as a hearsay exception) cannot be used in a revocation hearing unless it passes a balancing test." *Curtis*, 2010 U.S. App. LEXIS 24172, at *11 (citing *Valdivia*, 599 F.3d at 990).

Further, the Tenth Circuit pointed out in *Curtis* that it and four other circuits also apply a test different from *Comito*'s. Reflecting core due-process principles, those circuits allow for the admission of hearsay evidence without a showing of cause for the declarant's absence if the evidence is sufficiently reliable. *Id.* at *7-8. For example, the Third Circuit acknowledges that, while courts should normally use a balancing test, there are circumstances where "the releasee's interest in confrontation may be overwhelmed by the hearsay's reliability such that the Government need not show cause for a declarant's absence." *United States* v. *Lloyd*, 566 F.3d 341, 345 (3d Cir. 2009). And, although the Sixth Circuit typically employs a reliability test, see *United States* v. *Kirby*, 418 F.3d 621, 628 (6th Cir. 2005), it applied a balancing test in *United States* v. *Waters*, 158 F.3d 933, 940 (6th Cir. 1998).

Thus, the circuits have taken conflicting approaches, including: (1) a balancing test such as in *Comito*, where the releasee's right is balanced against the government's good cause in denying it; and (2) a reliability test that permits hearsay evidence to be admitted without a showing of cause for the declarant's absence based on sufficient indicia of reliability. This Court should resolve the conflict, in favor of allowing the States to use reliable hearsay in parole-revocation hearings.

C. The Ninth Circuit Opinion Threatens to Extend to Defendants in Criminal Cases, Confrontation Rights Under the Due Process Clause of the Fourteenth Amendment.

A defendant in a criminal prosecution has at stake a far greater liberty interest than does a convicted parolee, who is still in constructive custody and stands to have his parole revoked. The criminal defendant's constitutional protections, therefore, are far greater too. See *Morrissey*, 408 U.S. at 488-89. Thus, the Confrontation Clause erects a strict bar to un-confronted testimonial statements in criminal prosecutions. *Crawford*, 541 U.S. at 68. In contrast, in the parole-revocation context, due-process concerns do not prohibit "use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions and documentary evidence." *Gagnon*, 411 U.S. at 782 n.5.

But, as explained above, the Ninth Circuit decision in this case elevates the meaning of confrontation in parole revocations under the Fourteenth Amendment, to provide parolees with greater protection under the Due Process Clause than the Confrontation Clause provides to criminal defendants. Requiring state hearing officers to engage in *Comito* balancing for nontestimonial hearsay to be admitted in parole-revocation hearings, but permitting the admission of nontestimonial hearsay in criminal prosecutions under hearsay exceptions, achieves an incongruous result. As stated by the en banc dissent below, "if the Due Process Clause of the Fourteenth Amendment guarantees to parolees the right to have a hearing officer conduct the *Comito* balancing test before he admits nontestimonial evidence, surely a criminal defendant, who has an even greater liberty interest, has a due process right to have a trial judge conduct the *Comito* balancing test before he admits the same evidence." App., *infra*, 87a.

Thus, the Ninth Circuit has skewed the Constitution, interpreting it as if it afforded more confrontation protection to parolees than to criminal defendants. Criminal defendants now will seek to use the Ninth Circuit's decision as a springboard to demand *Comito*-type balancing for nontestimonial hearsay in criminal prosecutions, based not on the Sixth Amendment's Confrontation Clause, but on the Fourteenth Amendment's Due Process Clause.

D. This Case Presents a Proper Vehicle for Resolving the Important Question Presented in this Petition.

While it is true that the issue in this case initially arose from a dispute about the scope of the injunction, the Ninth Circuit's opinion operates beyond nuances of the injunction as a purported constitutional rule binding on California and other States within the circuit. The Ninth Circuit approached the issue as constitutional, not contractual, even noting that the State was ordered by the district court "to follow *Comito* and limit the use of hearsay evidence to the boundaries set by parolees' confrontation rights." App., *infra*, 10a.

Explaining that it was "bound" by *Comito* as the clear law of the circuit, the panel majority pronounced that "the *Comito* test remains central to confrontation rights in parole hearings." App., *infra*, 3a, 8a. The majority opinion affirmed that "*Comito* balancing continues to be the test in the Ninth Circuit, and that even if hearsay falls within a recognized exception, it is still subject to *Comito* balancing." App., *infra*, 10a. This holding, clearly, is not dependent on the injunction, but on the Ninth Circuit's construction of due process binding in all parole-revocation cases. The fact that the State Defendants entered into the original injunction, then, poses no impediment to review of the constitutional question by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: December 27, 2010

Respectfully submitted,

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