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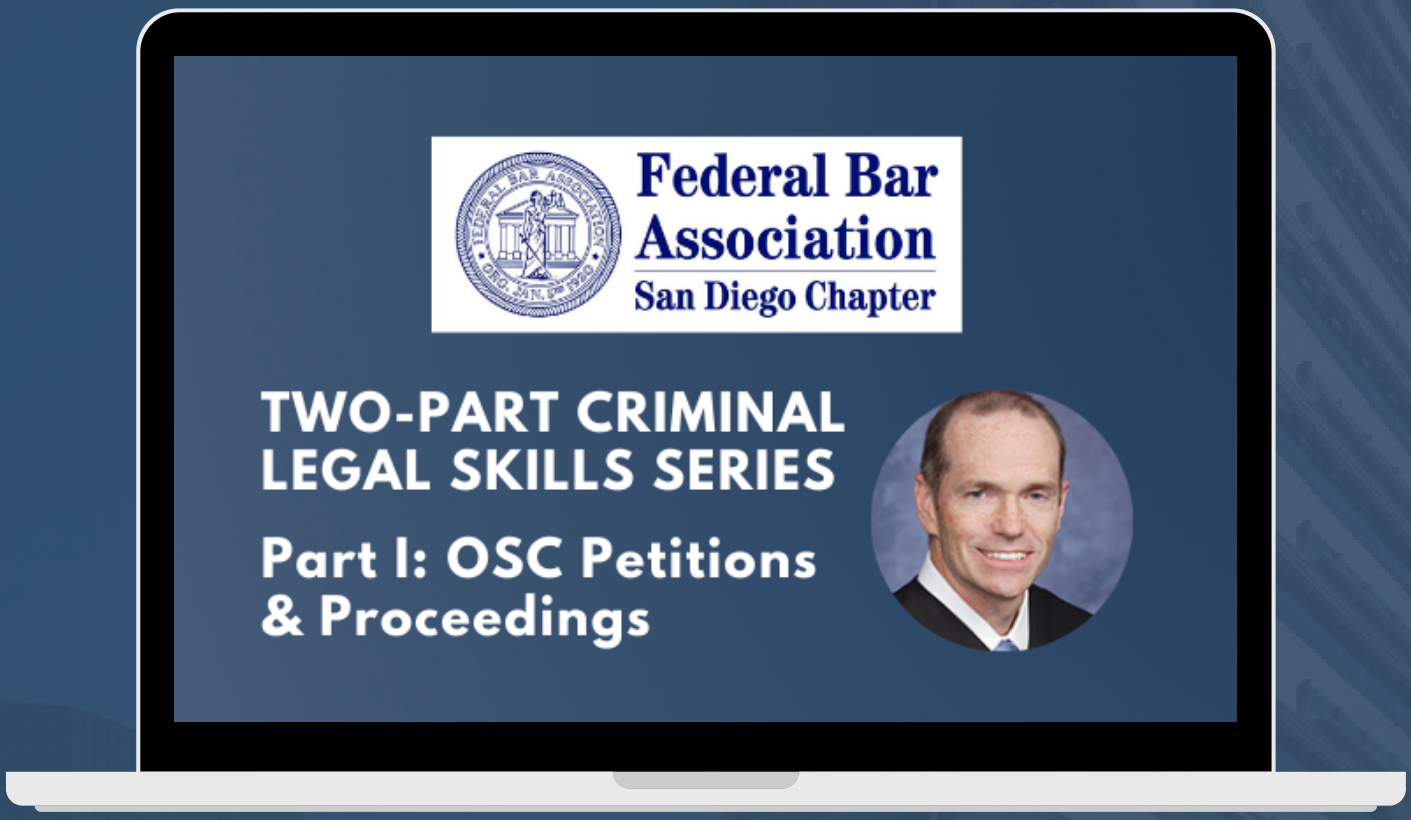

Part 1 of the Series will cover various aspects of OSC petitions and proceedings, including filing procedures, contesting the allegations, evidentiary hearings, and more!

Panelists:

- Honorable William Q. Hayes
- Assistant United States Attorney Michelle Pettit
- Federal Defender Elana Fogel
- Supervisory probation officer Ymelda Valenzuela

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JUDGE WILLIAM Q. HAYES, of the Southern District of California, was appointed a District Judge on October 6, 2003. Prior to his appointment, Judge Hayes was an Assistant United States Attorney, Southern District of California, 1987 to 2003, serving as Chief of the Criminal Division from 1999 to 2003. He previously practiced law in Denver, Colorado, as an associate at Stone and Associates, from 1984 to 1986, and as an associate at Scheid and Horlbeck, from 1983 to 1984. Judge Hayes received his B.S. from Syracuse University in 1979, his M.B.A. from Syracuse University Graduate School of Business in 1983, and his Juris Doctorate from Syracuse University School of Law in 1983. He maintains his chambers in San Diego.

Legal Teaching Positions:

1984 – 1985	Adjunct Faculty, National College, Denver, Colorado
1985 – 1986	Adjunct Faculty, University of Colorado at Denver
1989 – 1996	Adjunct Faculty, Thomas Jefferson School of Law, San Diego, California
1998	Adjunct Faculty, University of San Diego School of Law, San Diego, California

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MICHELLE PETTIT is an Assistant United States Attorney (AUSAs) in the Southern District of California, where she has worked in the Criminal Division for 14 years, prosecuting a wide range of cases such as immigration offenses, drug trafficking, child exploitation, sexual assault, cybercrimes, terrorism, and murder. She is currently the Deputy Chief of Intake, coordinating the initial processing of all reactive cases and training new criminal AUSAs in the District. Prior to law school, Mrs. Pettit served as a Surface Warfare Officer in the U.S. Navy and completed two Persian Gulf deployments on Navy Destroyers. After transferring to the Judge Advocate General (JAG) Corps, she advised Navy officials on personnel and military justice matters and served as the Senior Trial Counsel in the Southwest Region before leaving active duty. Subsequently, she transferred to the Navy Reserves, where she has served as an Appellate Defense Counsel, an Executive Officer, an Appellate Judge on the Navy-Marine Corps Court of Criminal Appeals, and the Chief Trial Judge and the Commanding Officer of the Navy Reserve Trial Judiciary. Mrs. Pettit earned her B.S., with distinction, from the United States Naval Academy, and her J.D. from Vanderbilt University Law School, where she was inducted into the Order of the Coif and served as a Managing Editor of the *Vanderbilt Law Review*. As an active member of the San Diego legal community, she is a Past President of the San Diego Chapter of the Federal Bar Association, and she is serving as a Director on the National Federal Bar Association Board.

ELANA FOGEL is a Trial Attorney with the Federal Defenders of San Diego, Inc. After graduating from New York University School of Law in 2013, Ms. Fogel began her career in indigent defense at the Committee for Public Counsel Services in Boston, MA. She then pursued systemic criminal justice reform, focusing on bail reform and oversight of surveillance technologies, as a Legal Fellow for the Criminal Justice Policy Program at Harvard Law School. Ms. Fogel joined the Federal Defenders in 2017.

YMELDA E. VALENZUELA is a Supervisory U.S. Probation Officer in the Southern District of California, in the Supervision Division. Ms. Valenzuela has been a U.S. Probation Officer for 15 years and her federal appointment began in the District of Arizona where she held assignments in both the Investigations and Supervision Division. She has been with the Southern District of California Probation Office for the last 9 years. Ms. Valenzuela has been assigned to the Supervision Division, and previously supervised a population of high-risk offenders and served as the Location Monitoring Specialist for the office.

Probation and Supervised Release

The United States Code (U.S.C.) and the Guidelines Manual both address the imposition of probation and supervised release, and the response to violations of their conditions. This document serves as a quick reference to both the statutes and guidelines. Note that Chapter Seven of the Guidelines Manual, Violations of Probation and Supervised Release, contains a series of policy statements that must be correctly applied and considered, but are advisory.

Terms of Supervised Release and Probation

	Imprisonment Range 18 U.S.C. § 3559	Statutorily Authorized TSR 18 U.S.C. § 3583(b)	Guideline Authorized TSR USSG §5D1.2*	Imprisonment Upon Revocation 18 U.S.C. § 3565(e)(3)	Probation 18 U.S.C. § 3561
Class A Felony	Life Imprisonment or Death	Not more than 5 years	2-5 years	5 years	Prohibited
Class B Felony	25 years or more	Not more than 5 years	2-5 years	3 years	Prohibited
Class C Felony	10 years < term < 25 years	Not more than 3 years	1-3 years	2 years	1-5 years
Class D Felony	5 years < term < 10 years	Not more than 3 years	1-3 years	2 years	1-5 years
Class E Felony	1 years < term < 5 years	Not more than 1 year	1 year	1 year	1-5 years
Class A Misd.	6 months < term < 1 year	Not more than 1 year	1 year	1 year	Not Applicable

*USSG §5D1.2(b) provides that the TSR shall not be less than any statutory term of TSR.

Should the defendant violate his probation term, the maximum sentence that may be imposed is the statutory maximum for the original offense of conviction.

Classification and Reporting of Violations - §§7B1.1 & 7B1.2

GRADE A

Conduct constituting a federal, state, or local offense either:

1. Punishable by imprisonment exceeding one year, if
   a. Crime of Violence;
   b. Controlled substance offense; and/or
   c. Possession of § 5845(a) firearm or device.
2. Any other offense punishable by imprisonment exceeding 20 years.

Shall be promptly reported to the court.

GRADE B

Conduct constituting any other federal, state, or local offense punishable by imprisonment exceeding one year.

Shall be promptly reported to the court.

GRADE C

Conduct constituting any other federal, state, or local offense punishable by imprisonment of one year or less
-or-
A violation of any other condition of supervision (*i.e.*, "technical violations").

Shall be promptly reported unless:
USPO determines violation is minor and not part of a continuing pattern of violations,
-and-
Non-reporting will not present an undue risk to an individual or the public or be inconsistent with any direction of the court.

Revocation of Probation and Supervised Release

GRADE A OR B VIOLATIONS

The court shall revoke supervision.

§7B1.3(f) - The revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving.

GRADE B OR C VIOLATIONS

Minimum term - 3, 4, 5, or 6 months

Minimum term may be satisfied by:

1. Imprisonment.
2. Imprisonment with TSR that substitutes community confinement or home detention according to schedule in §7B1.3(c)(1) for any portion of the minimum term.

Minimum term - 7 or 8 months

Minimum term may be satisfied by:

1. Imprisonment.
2. Imprisonment with TSR that substitutes community confinement or home detention according to schedule in §7B1.3(c)(2) provided that one half of minimum term involves imprisonment.

In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.

GRADE C VIOLATIONS

Revoke supervision or extend the term of supervision and/or modify conditions of supervision.

Mandatory Revocation - 18 U.S.C. §§ 3565(b) and 3583(g)

The court must revoke for certain violations of probation and supervised release:

1. firearms possession;
2. drug possession;
3. refusal to take drug test; and/or
4. four positive drug tests in a year.

However, §§ 3563(e) and 3583(d) provide a treatment exception for failed drug tests.

Revocation Table - §7B1.4

Grade of Violation	Criminal History Category* I	II	III	IV	V	VI
Grade C	3-9	4-10	5-11	6-12	7-13	8-14
Grade B	4-10	6-12	8-14	12-18	18-24	21-27
Grade A (1)	Except as provided in subdivision (2) below: 12-18	15-21	18-24	24-30	30-37	33-41
(2)	Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony: 24-30	27-33	30-37	37-46	46-57	51-63

*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervision.

Synopsis of the Relevant Case Law

The Federal Rules of Evidence do not apply in supervised release revocation proceedings. Fed. R. Evid. 1101(d)(3); *United States v. Walker*, 117 F.3d 417, 421 (9th Cir. 1997). Nor does the full panoply of Constitutional rights implicated during a criminal trial. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Nonetheless, there are certain "minimum requirements of due process" present in a revocation proceeding. *Id.* at 488–89. These rights, however, are based in the Due Process Clause of the Fourteenth and Fifth Amendments and not in the Confrontation Clause of the Sixth Amendment. *United States v. Hall,* 419 F.3d 980, 985-86 (9th Cir. 2005) (finding "no basis in *Crawford* or elsewhere to extend the *Sixth Amendment* right of confrontation to supervised release proceedings.") (referencing *Crawford v. Washington,* 541 U.S. 36 (2004)). Thus, hearsay testimony that might be precluded at trial by the Federal Rules of Evidence or the Confrontation Clause is not necessarily inadmissible at a supervised release revocation hearing. *See Morrissey* at 489.

In *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999), the Ninth Circuit held that the admission of hearsay at a revocation proceeding can violate a defendant's due process right to confront the witnesses against him under the Fifth Amendment. *Id.* at 1170. *Comito* established a balancing test, in which "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.* (citing *Walker*, 117 F.3d at 420).

Under this test, the court should first "assess the significance of the releasee's interest in the right to confrontation." *Id.* at 1177. While every releasee has a right to confrontation, the right is not static, but is of greater or lesser importance depending on the circumstances. *Id.* (citing *United States v. Martin*, 984 F.2d 308, 310-11 (9th Cir. 1993)). "The weight to be given the right of confrontation in a particular case depends on two primary factors: "[first,] the importance of the hearsay evidence to the court's ultimate finding, and [second,] the nature of the facts to be proven by the hearsay evidence." *Id.* With respect to the latter, indicia of reliability plays an important part in the analysis. *Id.*

On the other side of the balance, courts "examine the good cause offered by the Government" for precluding a defendant from his right to confront. *Id.* at 1171-72. In so doing, courts look "to both the 'difficulty and expense of procuring witnesses' and the 'traditional indicia of reliability' borne by the evidence, in evaluating good cause." *Martin*, 984 F.2d at 312 (internal citations omitted). Of note, indicia of reliability factors into both sides of the balance.

Courts have also found that when statements fit within established exceptions to the hearsay rule, that exception can be used to demonstrate their reliability. Though the Federal Rules of Evidence do not apply to revocation hearings, "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 *Morrisey v. Brewer*, 408 U.S. 471, 489 (1972)).

177 F.3d 1166
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Robert Vito COMITO, Defendant–Appellant.

No. 98–10202.
|
Argued and Submitted April 12, 1999.
|
Filed May 27, 1999.

Synopsis

Conditional release was revoked by the United States District Court for the District of Nevada, Lloyd D. George, J., and releasee appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that hearsay testimony was improperly admitted at revocation hearing.

Reversed and remanded.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***1167** Timothy P. O'Toole, Assistant Federal Public Defender, Las Vegas, Nevada, for the defendant-appellant.

Robert A. Bork, Assistant United States Attorney, Las Vegas, Nevada, for the plaintiff-appellee.

Appeal from the United States District Court for the District of Nevada; Lloyd D. George, District Judge, Presiding. D.C. No. CR–97–00016–LDG.

Before: SCHROEDER, REINHARDT, and SILVERMAN, Circuit Judges.

Opinion

REINHARDT, Circuit Judge:

Robert Vito Comito appeals one of the district court's findings of a violation of the terms of his supervised release, as well as his sentence, which was based in part on the disputed violation. He does not challenge the revocation itself, because he concedes that three uncontested minor violations are legally sufficient to support that action. Because we hold that Comito's due process right to confrontation was violated with respect to the disputed violation, we reverse and remand with respect to that violation and the sentence.

I.

In 1992, Comito pled guilty to one count of cocaine distribution and was sentenced to sixty-three months' imprisonment and six years of supervised release. A year and a half after he completed serving his prison sentence, the district court revoked Comito's supervised release, finding four separate violations of the conditions of his release: the unauthorized use of his former girlfriend's bank cards, credit cards and checks (a "grade B violation") and three lesser violations ("grade Cs").

At the revocation hearing, Comito admitted the grade C violations, but contested the grade B violation. He acknowledged using Deirdre Connell's cards and checks, but contended that he had done so with her permission, and that any unauthorized charges were made by someone else. Comito concedes that the three admitted grade C violations support revocation of his supervised release, but argues persuasively that because they constitute a lower grade of violation than the alleged fraud, the finding of the fraud violation led to imposition of a far longer sentence. Comito was sentenced to thirty months' imprisonment for his violations of the conditions of supervised release. The recommended sentencing range for the grade C violations under the Sentencing Guidelines' Chapter 7 policy statements was seven to thirteen months.[1] *See* *Williams v. United States,* 503 U.S. 193, 200–01, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992) (Sentencing Guidelines' policy statements are authoritative guides); *United States v. Plunkett,* 94 F.3d 517, 518 (9th Cir.1996) (Chapter 7 policy statements are binding on federal courts).

***1168** The crux of the alleged fraud violation was the accusation made by Deirdre Connell, Comito's former girlfriend and roommate, to Comito's probation officer, Officer Perdue, that Comito had used her bank cards, credit cards and checks without her permission. Connell was not present to testify at the initial revocation hearing. Because her evidence was expected to be critical to the determination of that violation, the district court granted a continuance so that the government could subpoena her. However, Connell still was not present at the continued hearing. At the beginning of the hearing, counsel for the government stated his intent

to offer the testimony of Officer Perdue regarding what Connell had said to him concerning Comito's use of her cards and checks. Comito's lawyer strenuously objected to the use of this hearsay testimony to prove the violation and forcefully asserted that its admission would violate his client's confrontation rights.

The court asked counsel about the circumstances surrounding Connell's absence. The Assistant United States Attorney said that the Government had been unsuccessful in its attempt to subpoena her. He alleged, based on information given to him by Comito's probation officer, that Connell was afraid that she would be harmed by an unknown associate of Comito's should she testify. Comito's counsel, on the other hand, stated that he had personally spoken to Connell as recently as half an hour prior to the hearing, during which conversation she had told him that the only reason she had made the allegations was because her romantic relationship with Comito had soured at the time, that she would not repeat the allegations at the hearing, and that her reluctance to testify was due to fear of perjury charges or other repercussions should she change her story. Moreover, Comito's counsel stressed that, to the best of his knowledge, Connell was not afraid of his client, pointing to her almost daily visits and telephone calls to Comito at the Detention Center. After hearing from counsel on this issue, the District Judge stated that his "inclination would be to see what is said and what kind of foundation is laid, but clearly, ... hearsay can be considered and it would—if this were the only violation of the defendant it might be different, but this defendant, if what has been alleged is true, has a lot of problems."[2]

Officer Perdue then testified to what Connell had told him about the alleged fraud. According to Officer Perdue, Connell contacted him in early January 1998, and told him that a number of unauthorized transactions had occurred involving several of her credit cards and bank accounts in December 1997 and that in her opinion Comito was responsible for all of them. Perdue said that Connell accused Comito and an unknown associate of taking her credit cards from her wallet and using and then replacing them, and also claimed that checkbooks from two different bank accounts had been stolen, and checks had been forged and sent to her credit card companies to cover some of the unauthorized transactions. He did not testify as to any efforts to secure Connell's presence, provide any explanation for her absence, or iterate the statements attributed to him earlier in the proceeding by counsel for the Government.

In addition to Officer Perdue's testimony regarding Connell's allegations, the government offered four other pieces of evidence concerning the transactions, which to varying degrees provided corroboration for certain aspects of the charge, but which collectively fell far short of the quantum of proof required to support a finding of the charged violation. This evidence consisted of: stipulated testimony of a Las Vegas Police Detective that Connell ***1169** had reported unauthorized bank card transactions, that no charges had been filed, and that the case remained open;[3] a memorandum written by Connell, apparently at Officer Perdue's request, listing the dates and amounts of the transactions in question;[4] several of Comito's unemployment compensation documents and his December 1997 bank statement; and, Officer Perdue's testimony regarding his discussion with a credit card fraud investigator about the investigator's conversations with Connell and Comito. While the additional evidence may also be subject in whole or in part to valid objections based on hearsay and Comito's right to confrontation, those challenges are not raised before us. Only Officer Perdue's testimony regarding what Connell purportedly told him is at issue in this appeal.

Before Comito took the stand to contest the fraud allegation, his counsel requested a further continuance so that Connell could be present. The District Judge denied this request. Comito then testified to the following: Throughout his relationship with Connell, each had used the other's credit cards, and Connell had given him her ATM PIN number so that he could have access to her bank accounts. Toward the end of 1997 Connell noticed that one of her credit cards was missing, and he believed she had lost it in a move a few months earlier. In early January of 1998, he moved out of the house he shared with Connell because they were not getting along, and moved in with another woman. Shortly thereafter, he became aware of Connell's concerns regarding unexpectedly large charges on her credit cards and some missing checks. While he did make some purchases with Connell's credit cards during December, he had her (at least tacit) consent for these transactions, he took responsibility for these charges, and he was not responsible for the other charges or the missing checks. Other individuals, who had used Connell's cards in the past, may have had access to those cards. Following his arrest for the alleged supervised release violations, he and Connell had a reconciliation, and she then told him that she was sorry that she had made the accusations and would withdraw them. She also told him that the unauthorized charges were "still on-going" and that as he was then in jail, she knew that he was not the guilty party. As

part of their reconciliation, he and Connell agreed to try to pay off her debts together, as he "felt kind of partly responsible ... because [of the possibility that] it was indeed anybody that [he] knew that used her cards or stole her checks." The conversation with the credit investigator, to which Officer Perdue referred, was in accordance with that agreement.

Following Comito's testimony, his counsel made a brief closing argument reiterating his objections to the hearsay evidence, reasserting his client's constitutional right to confrontation, and asking the court to find that only the grade C violations had been committed. Without ruling specifically on the admissibility of Officer Perdue's hearsay testimony or explaining the basis for his findings, the district court found that Comito had committed all four of the violations of supervised release alleged in Perdue's Revocation Petition. Then, without explanation or reference to the Sentencing Commission's Guidelines, the court sentenced Comito to thirty months. [5]

II.

Comito challenges the district court's reliance on Officer Perdue's hearsay testimony to establish the fraud violation—the testimony regarding Connell's ***1170** verbal statements—and contends that he was denied his due process right to confrontation. In *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the Supreme Court defined certain minimum due process requirements for parole revocation, which have since been extended to the revocation of probation, *see* *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), and the revocation of supervised release, *see* Fed.R.Crim.P. 32.1. Under *Morrissey,* every releasee is guaranteed the right to confront and cross-examine adverse witnesses at a revocation hearing, unless the government shows good cause for not producing the witnesses. 408 U.S. at 489; *see also* Fed.R.Crim.P. 32.1(a)(2)(D) ("opportunity to question adverse witnesses"). This right to confrontation ensures that a finding of a supervised release violation will be based on verified facts. *See* *Morrissey,* 408 U.S. at 484. Accordingly, in determining 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. *See* *United States v. Walker,* 117 F.3d 417, 420 (9th Cir.1997) (citations omitted).

In the present case, the district court failed to conduct the requisite due process balancing test, or even to rule directly on the admissibility of Officer Perdue's hearsay testimony, despite that fact that at the inception of the revocation hearing the parties had accurately described the balancing test to the court. Although the judge initially stated that he would hear the disputed hearsay testimony and then rule on its admissibility, he did not clearly make a further ruling on Comito's due process objections. Because the hearsay testimony was presented and because the district judge simply found without explanation or comment that the alleged violation had occurred, we assume that the evidence was admitted. We assume this, also, because there was insufficient evidence to support a finding of the charged violation in the absence of Officer Perdue's testimony, and the Government does not contend otherwise. However, while the district court's failure to perform the balancing test was erroneous, that error is not necessarily fatal. We still must review the underlying question to determine if Comito's confrontation rights were violated, and, if so, whether the violation was harmless beyond a reasonable doubt. *See* *United States v. Vargas,* 933 F.2d 701, 704–05 (9th Cir.1991). [6]

This court has previously applied the balancing test in two cases. We have considered whether the rights of supervised releasees in revocation proceedings were violated by (1) the admission of a probation officer's testimony regarding the content of records maintained by another probation officer and (2) the admission of urinalysis test results without any opportunity for the releasee to retest the urine samples. *See* *Walker,* 117 F.3d at 420–21 (holding that releasee's right to confrontation was not violated by the admission of a probation officer's testimony regarding the content of official records maintained by another probation officer, because the releasee did not dispute either the substance or the reliability of the hearsay testimony); *United States v. Martin,* 984 F.2d 308, 309–10 (9th Cir.1993) (holding that the releasee's right to confrontation was violated where he was convicted of possession of a controlled substance based solely on the hearsay evidence set forth in the results of two urinalysis examinations). We have not previously considered whether a releasee's right to confrontation may be outweighed where the adverse hearsay testimony consists ***1171** of a witness reporting another person's unsworn verbal statements—in

this case, the statements of the victim of the offense which constitutes the releasee's alleged violation. It is in this context that we must now apply the balancing test.

First, we must assess the significance of the releasee's interest in the right to confrontation. As we have previously stated, although every releasee has the right to confrontation, this right is not static, but is of greater or lesser significance depending on the circumstances. *Martin,* 984 F.2d at 310–11. The weight to be given the right to confrontation in a particular case depends on two primary factors: 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.[7] *See id.* at 311. As the *Martin* court emphasized, "[t]he more significant particular evidence is to a finding, the more important it is that the releasee be given an opportunity to demonstrate that the proffered evidence does not reflect 'verified fact.' " *Id.* So, too, the more subject to question the accuracy and reliability of the proffered evidence, the greater the releasee's interest in testing it by exercising his right to confrontation.

Here, the hearsay testimony was, indisputably, important to the finding of the violation. Comito was charged with using Connell's credit cards and checks without her permission; he admitted to using the financial instruments, but testified that he had her authorization to do so. Thus, the contested element of the violation was whether Connell authorized Comito to use her cards and checks. The hearsay testimony consisted of the alleged victim's purported statements regarding that critical question: Officer Perdue testified as to what Connell told him regarding her consent or lack of consent to the use by Comito of her cards and checks. Thus, Comito had a very strong interest in demonstrating that the hearsay testimony did not reflect "verified fact."

Comito's interest in confronting Connell directly was further strengthened by the nature of the disputed hearsay evidence. Unsworn verbal allegations are, in general, the least reliable type of hearsay, and the particular utterances at issue here bore no particular indicia of reliability. Unlike in *Martin,* where the disputed hearsay involved urinalysis reports, which, as regular reports of a company whose business is to conduct such tests, are due a certain weight, 984 F.2d at 314, or in *Walker,* which involved the official records of a probation officer, 117 F.3d at 421, the hearsay here was not inherently reliable. Connell's statements were not made under oath, or in any other context that might lend them credence. Rather, shortly after their romantic relationship ended, Connell, the releasee's ex-girlfriend, called Officer Perdue and accused her then-former lover of using her cards and checks. *Compare* *United States v. Fennell,* 65 F.3d 812, 813–14 (10th Cir.1995) (unsworn allegations made by defendant's former girlfriend to probation officer during a telephone interview lack even minimal indicia of reliability); *see also* *United States v. Huckins,* 53 F.3d 276, 279 (9th Cir.1995) (hearsay evidence did not have minimal indicia of reliability required for admission at sentencing where it consisted of unsworn statements made by accomplice in the course of plea negotiations with the government). In addition, the hearsay testimony related to facts of which only Connell and Comito had direct knowledge.

Because the hearsay evidence was important to the court's finding, and because it involved the least reliable form of hearsay, Comito's interest in asserting his right to confrontation is at its apogee. We now ***1172** examine the good cause offered by the Government for denying Comito that right.

The reasons that may constitute good cause for denying a releasee his right to confrontation in a revocation hearing vary, of course, depending on the specific circumstances. Whether a particular reason is sufficient cause to outweigh the right to confrontation will depend on the strength of the reason in relation to the significance of the releasee's right. In some instances, mere inconvenience or expense may be enough; in others, much more will be required. *See* *Martin,* 984 F.2d at 312. Here, the Assistant United States Attorney claimed that the Government was unable to subpoena Connell and that she was unwilling to testify because she was afraid of Comito (or an unknown associate of his). We need not decide whether or under what circumstances a fear for one's own safety or that of a family member might justify the use of hearsay testimony in a revocation proceeding. In this case, the government offered no evidence of any such fear on the part of the absent witness, despite the fact that the probation officer who had spoken with her and who, the Assistant United States Attorney said, had made an effort to subpoena her, was the primary witness at the hearing; and despite the fact that the officer presented the critical hearsay testimony regarding what Connell told him about the events that underlay the charges. Counsel for the Government never asked Officer Perdue during the course of his testimony about Connell's reasons for not appearing, about anything she told him regarding that question, or even about any effort he may have

made to subpoena her. Nor did the Government offer evidence of any kind regarding Connell's fear of Comito. [8] This despite (or perhaps because of) representations by Comito's counsel that Connell visited and called Comito in jail almost daily, and that only a half hour before the hearing Connell had told him that she was afraid not of Comito but rather of causing legal trouble for herself if she appeared at the hearing and repudiated the story she had told Officer Perdue. Thus, no cause has been shown for denying Comito his confrontation rights—there is nothing at all to put on the Government's side of the scale.

The Government also argues that, even absent a showing of difficulty in obtaining Connell's testimony, the hearsay evidence bears sufficient indicia of reliability, by virtue of the other testimony and evidence presented at the hearing, to make it admissible. Given the substantial nature of Comito's interest in confrontation and the absence of good cause for the Government's failure to produce the adverse witness, the supporting or corroborative evidence noted by the Government cannot suffice to deprive Comito of his constitutional right to confrontation. [9]

***1173** The balancing test itself has shown not only that the denial of Comito's right to confrontation was erroneous, but that the error was not harmless beyond a reasonable doubt. Accordingly, we reverse and remand for further proceedings consistent with this disposition. Because Comito has now served over thirteen months, the outer limit of the Sentencing Guidelines' range for the grade C violations of the conditions of his supervised release, we direct that the mandate issue forthwith.

REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

All Citations

177 F.3d 1166, 99 Cal. Daily Op. Serv. 3980, 1999 Daily Journal D.A.R. 5091

Footnotes

1 In sentencing Comito, the district court exceeded the Sentencing Guidelines' range for a grade B violation (18–24 months). Comito also appeals this upward departure as a violation of his due process rights. Because of our conclusion that Comito's due process rights were violated in the finding of the grade B violation, we do not reach the sentencing issue. We note, however, that an upward departure is improper absent adequate notice and justification. *See* *United States v. Hinojosa–Gonzalez,* 142 F.3d 1122, 1123 (9th Cir.1998).

2 The other problems were apparently the three grade C violations. They consisted of the following: using a condominium and mailbox owned by his mother and brother without their permission; failing to give truthful answers to inquiries by his probation officer and to follow his probation officer's instructions; and failing to provide accurate employment and address information to his probation officer.

3 Defense counsel stipulated to this testimony with the caveat that Comito's hearsay objections were not waived.

4 This document was admitted into evidence over defense objection.

5 It is uncontested that Comito's proper criminal history category is V. The Guidelines' range for grade C offenses for this criminal history category is 7–13 months; for grade B violations, 18–24 months. U.S.S.C. Guidelines § 7B1.4(a).

6 The District Judge did reject Comito's hearsay objections to the admission of a report by a detective regarding a complaint made by Connell. Even were we to treat that ruling as being general in nature and thus applicable to Perdue's testimony also, our analysis would not change. As to the balancing test, when determining that the detective's report would be admitted, the court noted that the testimony was important but, mistakenly, appeared to consider this as a factor mitigating in favor of its admission rather than its exclusion.

7 These two factors, although always important, are by no means exhaustive. In other circumstances, other factors may be relevant. For example, in *Martin,* we also looked to the consequences of the court's findings, because, in that case, the court's finding, based on the hearsay evidence, that Martin possessed a controlled

substance, triggered application of a statutory mandatory minimum sentence, thus divesting the court of sentencing discretion. 984 F.2d at 312.

8 The Government counsel did, however, ask Officer Perdue one question that elicited the following information: Prior to the date on which Connell and Comito allegedly reconciled, in fact at Comito's initial hearing on Connell's charges, Comito was brought into court, in chains. When he saw Connell in the back of the courtroom, he took four steps in her direction and yelled “Bitch.”

9 Our review of the record shows that, in fact, the additional evidence is not particularly persuasive. That evidence consists of the memorandum Connell submitted to Officer Perdue regarding the unauthorized transactions, the stipulated testimony of Detective Olewinski regarding Connell's police report, the testimony of Officer Perdue regarding the statements of the credit investigator, and Comito's financial documents. Connell's memorandum was hearsay; it was not a sworn statement submitted to the court. The stipulated testimony of Officer Olewinski, that Connell had made a complaint to the police and that no action had been taken regarding her complaint, is more hearsay, to the extent that it is offered to prove the truth of Connell's allegations. Officer Perdue's testimony about his conversation with the credit investigator suffers from the same defect, doubled. Thus, the weight to be given all of the above evidence is limited. Finally, the financial records presented do show that, while Comito had no obvious source of income, he was nonetheless making large deposits in his bank account. Considering these records together with Connell's memorandum, one could infer that the deposits correlated with withdrawals of cash from Connell's accounts; however, this, too, fails to shed light on whether these withdrawals and deposits were made with or without Connell's consent. In addition, some of the evidence offered at the hearing, such as Comito's knowledge of Connell's PIN and the photograph of another individual using Connell's ATM card, pointed to the conclusion that Comito was not responsible for the unauthorized charges, thus further calling into question the reliability of the hearsay evidence.

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419 F.3d 980
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
William Lewis HALL, Defendant–Appellant.

No. 04–50193.
|
Argued and Submitted Feb. 18, 2005.
|
Filed Aug. 15, 2005.

Synopsis

Background: Defendant appealed revocation, by the United States District Court for the Southern District of California, Napoleon A. Jones, Jr., J., of his supervised release.

Holdings: The Court of Appeals, Wardlaw, Circuit Judge, held that:

admission of hearsay testimony did not violate defendant's rights under the Confrontation Clause;

defendant's due process confrontation rights were not violated by admission of hearsay testimony that defendant struck victim; and

defendant's due process confrontation rights were not violated by admission of hearsay testimony that defendant forcibly restrained victim from leaving apartment.

Affirmed.

Attorneys and Law Firms

***982** Mark F. Adams, San Diego, CA, for appellant.

Carol C. Lam, U.S. Atty., Mark R. Rehe, Asst. U.S. Atty., San Diego, CA, for appellee.

Appeal from the United States District Court for the Southern District of California; Napoleon A. Jones, District Judge, Presiding. D.C. No. CR–01–01084–1–NAJ.

Before: TASHIMA, WARDLAW, Circuit Judges, and COLLINS, District Judge. *

Opinion

WARDLAW, Circuit Judge.

We must decide whether the Sixth Amendment right to confront testimonial witnesses established in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), applies to the admission of hearsay evidence during revocation of supervised release proceedings.

Factual Background

William Lewis Hall was on supervised release when, on October 26, 2003, Hall's probation officer, Janet Bergland, picked up a voice mail message from Susan Hawkins reporting that Hall had been drunk and had beaten her up the night before. Hawkins had attempted to file a police report, but the police had been preoccupied fighting forest fires in the area at the time. [1] Hawkins intended to go to the police department that day to file the police report. The message also indicated that Hawkins had gone to a domestic violence shelter, which, in turn, had sent her to St. Vincent de Paul's homeless shelter. As was her practice, and pursuant to office policy, Officer Bergland memorialized the voice mail message in her official chronological record of activities in Hall's case.

Also on October 26, Hawkins sought treatment at University of California San Diego ("UCSD") Medical Center for multiple bruises and scratches. Hawkins told her treating physician, Dr. Glover, that her live-in boyfriend had assaulted her the night before. Dr. Grover concluded that Hawkins "had contusions on her elbow, her chest and her back" and that these injuries were "consistent with [her] complaint that she had been assaulted by her boyfriend with an open hand." He prescribed vicodin and ibuprofen to alleviate her pain and advised her to file a report with the police. Hawkins provided the hospital with only her name and birth date; she did not disclose any additional identifying information.

On October 29, Officer Bergland called Hall to inquire about Hawkins. Hall told Officer Bergland that Hawkins is a "street person" and a "hooker" [2] that he had taken in. He claimed that she had come to his room the night of the 25th and wanted

to use drugs. According to Hall, he said no, they argued, and he asked her to leave. Hall admitted that he slapped Hawkins once during the argument, but denied that he had been drinking that evening. He fell asleep before she left the room.

On October 30, Hawkins contacted the San Diego Police Department to file a ***983** domestic violence report. Officer Gross went to Saint Vincent de Paul's, where Hawkins was staying, to take the report. The only identification Hawkins gave Officer Gross was her name and social security number. Hawkins told Officer Gross that she had been living with Hall and that on the night of October 25th, she, Hall, and a man nicknamed "Red" were drinking in his room. She and Hall began to fight. Hall "slammed the heel of his left hand into her neck" and told Red to leave the apartment, which he did. After Red left, Hawkins told Hall that she wanted to get her stuff and leave. In response, Hall grabbed a golf club that he kept near the door and threatened to harm her if she attempted to leave the room. Over the next four hours Hawkins and Hall argued. During this time, Hall choked and battered her with the heel of his hand on three separate occasions. Hall also kept the phone away from Hawkins so she could not call the police.

Hawkins told Officer Gross that she eventually agreed to stay to pacify Hall and then left after Hall fell asleep.

After hearing Hawkins' recitation, Officer Gross called in a female officer to photograph Hawkins' injuries. Officer Tagaban photographed the bruises on Hawkins chest, back, and elbow. The two officers went that day to Hall's apartment and arrested him. They found the golf club exactly where Hawkins said it would be.

On November 6, 2003, Officer Bergland petitioned the district court for a no-bail bench warrant alleging four violations of Hall's supervised release conditions: inflicting corporal injury upon his girlfriend, falsely imprisoning her, associating with a felon, Red, and failing to notify his probation officer of his law enforcement contact and subsequent October 30 arrest within 72 hours. The district court issued the bench warrant. Hall was arrested on the warrant on November 18, 2003, and arraigned. Hall denied each of the allegations of noncompliance. A revocation hearing was set for April 8, 2004.

Before the evidentiary hearing, Hall moved the district court to exclude "the hearsay statements of Susan Hawkins," under the balancing test set forth in *United States v. Comito,* 177 F.3d 1166 (9th Cir.1999). The district court denied the motion. Three days later, the United States Supreme Court issued *Crawford.* Hall requested reconsideration of his motion to exclude Hawkins' hearsay statements, relying on the newly announced right to confront testimonial witnesses. The district court ruled that *Crawford,* which governs Sixth Amendment rights at trial, was not implicated by supervised release revocation proceedings. During the evidentiary hearing, conducted pursuant to Federal Rule of Criminal Procedure+ 32.1(b)(2), the government put on the five witnesses who had been in contact with Hawkins following the assault by Hall.

To summarize: Dr. Grover testified that he personally examined Hawkins. He found several contusions that were consistent with her description of Hall's assault on her with an open hand. He also identified Hawkins from the photos taken by Officer Tagaban.

Officer Tagaban authenticated the photographs she took of Hawkins' injuries and testified that Hawkins had stated that the injuries resulted from her beating at the hands of her boyfriend. She also testified that she and her partner, Officer Gross, went to Mr. Hall's apartment and arrested him.

Officer Gross testified that on October 29th he was dispatched to "investigate a potential domestic violence incident" at the Saint Vincent de Paul Shelter. When he arrived at the shelter, he met Ms. Hawkins. ***984** Hawkins told him that she was living with Hall, that on the night of the 25th she was "in Mr. Hall's apartment drinking with Mr. Hall and another gentleman by the name of Red," and that during the evening Hall and Red had argued over the attention Red had been paying to Hawkins, which led to Hawkins and Hall's argument. Hawkins told Officer Gross that Hall "got upset, choked her, and hit her with his hand and knocked her to the bed." After the first assault, Hall told Red to leave, which he did. Hawkins then told Hall, "You know what? I don't want any more problems. I don't want any more issues. Why don't you let me get my stuff and I'll leave and we'll be done." Hall's response was to choke her and hit her again. Hawkins again said she wanted to leave, and Hall grabbed a golf club from behind the door and said, "I'm going to fuck you up if you leave."

Hawkins reported to Officer Gross that she was very afraid of Hall and concerned for her safety. She had attempted to call the police but Hall had taken the phone from her and there was no way to escape because Hall's second floor apartment had only one small window that lead to a courtyard. Eventually,

she realized she could not argue her way out of the apartment so she told Hall, "You know what? I'm sorry. Let's make up. You know, all is forgiven. Let's start with a clean slate." This tactic worked. Hall hugged her and then eventually he laid down and passed out, allowing Hawkins to gather her things and leave.

Officer Gross also testified that Hawkins provided him Hall's full name, a physical description, and his address. After leaving Hawkins, Officer Gross went to Hall's apartment where he arrested Hall and found the golf club behind the front door, exactly where Hawkins said it would be. The golf club itself was entered into evidence.

"Red," whose real name is Hubert Bystel Hall, [3] testified that he was in Hall's apartment the night in question. He said he saw Hall slap Hawkins and that he left the apartment shortly after Hawkins was hit.

Finally, Officer Bergland testified. All of Officer Bergland's testimony derived from her "chronals," written chronological entries kept by every probation officer as a regular part of their duties. Officer Bergland reported that she received a voicemail message from Hawkins stating that Hall had "gott [en] drunk the previous night and beat her up" and that the police "were too busy fighting fire to take a report." After getting the message, she testified that she called Hall. He told her that Hawkins was living with him and that they had argued and he slapped her.

Officer Bergland also testified that she had tried to contact Hawkins at the St. Vincent de Paul shelter, but was told that Hawkins' family had sent for her and she had left without leaving a forwarding address.

At the end of the hearing, the district court sustained allegations one and two of the Violation Petition, the domestic violence and false imprisonment allegations, revoked Hall's supervised release, and sentenced him to 24 months in custody.

DISCUSSION

Hall contends on appeal that the admission of Hawkins' hearsay statements at his revocation hearing violated his Sixth ***985** Amendment right to confrontation as articulated in *Crawford.* As an alternative claim of error, Hall contends that even if we determine that *Crawford* did not give him an absolute right to confront Hawkins, a proper analysis of his due process rights under *Comito* would require exclusion of Hawkins' hearsay statements. We disagree.

I. Crawford Does Not Apply to Revocation Proceedings.

In *Crawford,* the Court held that the Sixth Amendment's Confrontation Clause gives criminal defendants the right to confront "testimonial" witnesses. 541 U.S. at 68–69, 124 S.Ct. 1354. "Testimonial statements" include statements taken by police officers during their investigations, such as Hawkins' statements to Officer Gross. *Id.* at 52, 124 S.Ct. 1354. Testimonial hearsay evidence may be admitted over the objection of the defendant only when the common law requirements of "unavailability and a prior opportunity for cross-examination" are met. *Id.* at 68, 124 S.Ct. 1354.

The Court derived this broad protection against testimonial hearsay evidence solely from the Sixth Amendment. *See id.* at 38, 124 S.Ct. 1354 ("The question presented is whether this procedure complied with the Sixth Amendment's guarantee that,'[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' ") (quoting U.S. Const. amend. VI); *id.* at 61, 124 S.Ct. 1354 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence ...."). As the Court noted, the Sixth Amendment applies only to "criminal prosecutions." *Id.* at 38, 124 S.Ct. 1354.

We reject Hall's assertion that *Crawford* extends the Sixth Amendment right to confrontation to revocation of supervised release proceedings. "We begin with the proposition that the revocation of parole [4] 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." *Morrissey v. Brewer,* 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). *See also Gagnon v. Scarpelli,* 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Because "[r]evocation 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" the full protection provided to criminal defendants, including the Sixth Amendment right

to confrontation, does not apply to them. *Morrissey,* 408 U.S. at 480, 92 S.Ct. 2593. Rather, a due process standard is used to determine whether hearsay evidence admitted during revocation proceedings violates a defendant's rights. *Id.* at 482, 92 S.Ct. 2593.

In *Crawford,* the Supreme Court addressed the Sixth Amendment rights of the accused in criminal prosecutions; it did not address the due process rights attendant to post-conviction proceedings for violations of conditions of release. *See* 2A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Criminal § 412 (3d ed. 2000 & Supp.2005). We, like the two circuits that have also addressed this question, see no basis in ***986** *Crawford* or elsewhere to extend the Sixth Amendment right of confrontation to supervised release proceedings. *See United States v. Aspinall,* 389 F.3d 332, 342 (2d Cir.2004) (holding that *Crawford* does not apply to probation revocation because *Crawford* and the Sixth Amendment apply only to "criminal prosecutions" and "it has long been established that probation revocation, like parole revocation, is not a stage of a criminal prosecution") (internal quotations omitted); *United States v. Martin,* 382 F.3d 840, 844 n. 4 (8th Cir.2004) (holding that the confrontation right in criminal prosecutions does not apply to supervised release revocation proceedings because they are not part of a criminal prosecution).

II. Due Process and the Comito Balancing Test.

Hall nevertheless enjoys a due process right to confront witnesses against him during his supervised release proceedings, as the Supreme Court held over thirty years ago in *Morrissey.* "Under *Morrissey,* every releasee is guaranteed the right to confront and cross-examine adverse witnesses at a revocation hearing, unless the government shows good cause for not producing the witnesses." *Comito,* 177 F.3d at 1170. 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.*

We must "assess the significance of the releasee's interest in the right to confrontation." *Id.* at 1171. "The weight to be given the right to confrontation ... depends on two primary factors: 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.* Because the nature of the facts proven by Hawkins' hearsay statements, as well as its significance to each of the violations found by the district court differ, we must balance Hall's interest in confronting Hawkins separately for each sustained violation.

A. Domestic Violence Violation.

Because the nonhearsay evidence introduced at the evidentiary hearing alone was sufficient to sustain the domestic violence allegation, the hearsay evidence could not have significantly affected the court's ultimate finding. *Cf. United States v. Martin,* 984 F.2d 308, 311 (9th Cir.1993) (finding a due process violation because the contested evidence was "uniquely important to the court's finding" and the district court "exclusively relied" on it in determining guilt). To convict Hall of inflicting corporal injury on his girlfriend, the court need only have found that Hall willfully inflicted "corporal injury resulting in a traumatic condition" on someone with whom he was cohabitating. *See* Cal.Penal Code § 273.5(a). Bruising is a "traumatic condition" for purposes of the statute. *People v. Beasley,* 105 Cal.App.4th 1078, 1085, 130 Cal.Rptr.2d 717 (2003) (finding bruising sufficient to sustain conviction under Section 273.5).

The nonhearsay evidence at the hearing was substantial and sufficient to conclusively prove the domestic violence charge. Red testified that he was in Hall's apartment that evening and saw Hall hit Hawkins. Hall admitted to Officer Bergland that he was living with Hawkins and that he had hit her that evening. These facts, combined with the photographs taken by Officer Tagaban revealing Hawkins' bruises ***987** shortly after the incident were sufficient to sustain the domestic violence violation. [5]

In addition, several pieces of evidence supporting the domestic violence allegation are admissible under hearsay exceptions. Although the Federal Rules of Evidence do not strictly apply to revocation hearings, *see United States v. Walker,* 117 F.3d 417, 421 (9th Cir.1997), 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. *See Morrissey,* 408 U.S. at 489, 92 S.Ct. 2593 ("[T]he process [in revocation hearings] should be flexible enough to consider evidence ... that would not be admissible in an adversary criminal trial.").

The medical records from Hawkins' hospital visit and the notes of Hall's parole officer were records kept in the ordinary course of business, classic exceptions to the hearsay rule. Fed.R.Evid. 803(6). Hawkins' statements to Dr. Grover, including that her live-in boyfriend had caused her injuries, were statements made for the purpose of medical diagnosis or treatment, and also hearsay exceptions. *See* Fed.R.Evid. 803(4) (describing as exceptions to the hearsay rule all "[s]tatements made for purposes of medical diagnosis or treatment ... or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment").

Hall's interest in excluding hearsay evidence relevant to the domestic violence allegation was thus weak, especially when weighed against the government's good cause for not producing Hawkins. *See infra* at 10637. *Cf.* *Comito,* 177 F.3d at 1171 (noting that the hearsay evidence was the only evidence provided for the contested element of the violation and therefore the releasee had "a very strong interest in demonstrating that the hearsay testimony did not reflect 'verified fact' ").

B. False Imprisonment Violation.

In contrast to the substantial nonhearsay evidence supporting the domestic violence charge, Officer Gross' account of Hawkins' statements regarding false imprisonment were undoubtedly significant to the court's ultimate finding. Under California law, false imprisonment is "the unlawful violation of the personal liberty of another." Cal.Penal Code § 236. The evidence of false imprisonment in this case primarily comes from Hawkins' account of the evening as testified to by Officer Gross.

1) Nature of facts to be proven by hearsay evidence.

The hearsay evidence relevant to the court's decision to sustain the false imprisonment allegation were the "[u]nsworn verbal allegations" of Hawkins to Officer Gross and are thus "in general, the least reliable type of hearsay." *Comito,* 177 F.3d at 1171. Unlike in *Comito,* however, Hawkins' statements bear indicia of reliability. Hawkins' statement to the police was supported by Gross' discovery of the golf club where she said it would be. Her statement is also corroborated by the consistency with which she reported the events of the evening to multiple people shortly after the incident, Red's testimony, Dr. Glover's medical conclusions, Hawkins' ***988** documented physical bruising, and even Hall's own statements to Officer Bergland. Finally, the reliability of the domestic violence aspect of her statements to the police gives credence to the rest of her account of the evening, including Hall's threats to injure her if she left the apartment. *See* *Martin,* 382 F.3d at 846 (finding, under the Eighth Circuit's balancing test, no due process violation, in part because the corroboration of the hearsay evidence made it inherently more reliable).

This is not the end of the inquiry, however. Simply because hearsay evidence bears some indicia of reliability does not render it admissible. *See* *Martin,* 984 F.2d at 313–314 (even urinalysis testing conducted by a laboratory is not sufficiently reliable to create a blanket rule that releasee has no interest in contesting the results). Hall's otherwise strong interest in confrontation is somewhat lessened by the reliability of the hearsay evidence, but it is not defeated.

Because Hall has a serious interest in confronting Hawkins as to the false imprisonment allegation, we must turn our attention to the other side of the scale to determine whether the government had good cause in failing to produce Hawkins, and whether that good cause outweighs Hall's right to confrontation.

2) The government's good cause.

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." *Id.* at 312 (citation and quotations omitted).

The government has provided a good reason for not producing Hawkins—despite substantial efforts to locate her, the government was unable to find her. Hawkins is a homeless woman who left the shelter where she was staying after the attack without leaving a forwarding address and has not been heard from since. Hall's probation officer tried to find her through the shelter. The government ran checks on Hawkins' social security number and birth date, the only identifying information it possessed, and were unable to locate her. The district court determined that the government had done all it could do to locate Hawkins. *See* *Martin,* 382 F.3d at 846 (finding that the government had good cause not to produce the witness because the witness refused to testify out of fear of retaliation by defendant). [6] This effort stands in stark contrast to cases where we have found that the government

did not have good cause for failing to produce a witness. *See, e.g., Comito,* 177 F.3d at 1172 (noting that the witness was readily available to the government, was in contact with the defendant almost daily, and the government offered no explanation for not producing her).

In addition, as discussed, the hearsay testimony regarding the false imprisonment bears some indicia of reliability. Hawkins statement to the police was supported by Gross' discovery of the golf club where she said it would be, the consistency with which she reported the events of the evening, the testimony of Red and Dr. Glover, the bruises on her body documented by the police photographs, and even Hall's own statements.

***989** Although Hall had a strong interest in confronting Hawkins with regard to the false imprisonment charge, on balance, that interest is outweighed by the government's good cause for not producing Hawkins as a witness and the independent indicia of reliability that support Hawkins' statements to Officer Gross.

CONCLUSION

Crawford does not create a Sixth Amendment right of confrontation applicable to supervised release revocation or similar proceedings. Hall had a due process right to confront a testimonial witness which is not absolute. Balancing the *Comito* factors, we conclude that Hall had little interest in confrontation with respect to the domestic violence allegation because the hearsay evidence was insignificant to the ultimate finding. This minimal interest was outweighed by the government's substantial showing of good cause for not producing Hawkins at the hearing. Although Hall had a relatively strong interest in confronting Hawkins with respect to the false imprisonment allegation, his interest in confrontation on that allegation is outweighed by the government's good cause for failing to produce Hawkins at the hearing—both because the government made every effort to do so and because the hearsay evidence was substantially corroborated. For these reasons, Hall's due process rights were not violated and the final order of revocation is affirmed.

AFFIRMED.

All Citations

419 F.3d 980, 5 Cal. Daily Op. Serv. 7190, 2005 Daily Journal D.A.R. 9859

Footnotes

* The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

1 *See* Louis Sahagun et al., *Southern California Firestorms; A Rampage of Firestorms,* L.A. Times, October 27, 2003, at 1A (describing the devastation caused by massive wild fires throughout Southern California, including closed highways and evacuations that diverted local manpower and resources).

2 Officer Bergland investigated the assertion that Hawkins was a “hooker.” She found that Hawkins had no criminal record or arrest for anything related to prostitution.

3 Hubert Hall has no relationship with the defendant. We refer to him by his nickname, “Red.”

4 Parole, probation, and supervised release revocation hearings are constitutionally indistinguishable and are analyzed in the same manner. *See United States v. Comito,* 177 F.3d 1166, 1170 (noting that the Supreme Court and the Federal Rules of Criminal Procedure have extended the same minimum due process rights to all three types of revocation proceedings).

5 Thus, given that the domestic violence allegation was proven by nonhearsay evidence, even if the hearsay evidence should not have been admitted, any error was harmless as to this allegation. *See Comito,* 177 F.3d at 1170 (improper admission of hearsay testimony is subject to harmless error review).

6 The difficulty of securing the testimony of domestic violence victims, like Hawkins, against their batterers is well recognized. *See* Tom Lininger, *Prosecuting Batterers After Crawford,* 91 Va. L.Rev. 747, 769 (2005) (citing research which showed that “the most common reason for dismissal of domestic violence prosecutions ... was victims' failure to make court appearances or to testify against the defendants”).

5 Cal. Daily Op. Serv. 7190, 2005 Daily Journal D.A.R. 9859

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