

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,)
 Plaintiff,)
vs.)
 Defendant.) Case No.

**MOTION OBJECTING TO ADMISSIBILITY OF HEARSAY IN
REVOCATION PROCEEDING AND MEMORANDUM OF LAW**

I. MOTION

Comes now the Defendant above, by and through his attorney of record, Glen R. Graham, and does hereby move this court to hold inadmissible the hearsay evidence under the specific facts of this case and object to the admissibility of hearsay evidence under the specific facts of this case in a revocation proceeding in violation of the defendant's rights to due process of law, and rights to confrontation, under both the Art. 2, § 20, 7, of the Oklahoma Constitution, and the 6th and 14th Amends., of the U.S. Constitution, and under case law there under, and as further set forth in the incorporated memorandum of law herein. Further, the hearsay evidence in this matter is the only or primary evidence, the indicia of reliability of hearsay evidence must be *substantial* in order to furnish legally sufficient grounds for revocation. Due Process jurisprudence shows that a baseline of *reliability* still applies in determining evidentiary admissibility and may even mandate some entitlement to cross-examination in some cases. Hearsay evidence can *easily be manufactured* and there is insufficient evidence of the reliability or trustworthiness of the hearsay in this case.

II. MEMORANDUM OF LAW

It has long been the law that a sentencing court or a revocation court may consider types of information inadmissible at a criminal trial. Due Process jurisprudence shows that a baseline of *reliability* still applies in determining evidentiary admissibility and may even mandate some entitlement to cross-examination.

While it is true that there is a trend toward the admissibility of hearsay statements in revocation hearings, **when hearsay is the only or primary evidence**, the indicia of reliability of hearsay evidence must be *substantial* in order to furnish legally sufficient grounds for revocation.

The rule is that the evidence must be competent. Look at ***Meyer v. State***, 596 P.2d 1270 (1978), which under its specific facts did not find the hearsay to be competent and did not find the hearsay to have sufficient indicia of reliability and trustworthiness to substitute for a live witness and held inadmissible a hearsay statement by a probation officer in a revocation proceeding. Hearsay that fails to have the requisite indicia of reliability and trustworthiness should not be admissible. Arguably, before hearsay could even be considered, there must be a showing on the record ***why the hearsay was reliable*** and why that reliability was substantial enough to supply good cause for not producing the live witness.

While it is true that there is a trend toward the admissibility of hearsay statements in revocation hearings, and a defendant is not entitled to the "full panoply of

constitutional rights in a revocation hearing, there is still a due process right and a balancing test which must be performed prior to the admission of hearsay evidence. Generally, a court may balance the probationer's right to confront an adverse witness against the grounds asserted by the government for not requiring confrontation. When hearsay is the only evidence, the indicia of reliability *must be substantial* in order to furnish legally sufficient grounds for revocation.

Defendants are entitled to minimal due process rights, including "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds *good cause* for not allowing confrontation)," quoting *Morrissey*, 408 U.S. at 489. (*Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)).

The question thus remains whether good cause exists for denying confrontation and whether the hearsay has sufficient *indicia of reliability* to be admitted under the facts of this case.

Crawford v. Washington, 541 U.S. 36, 90 S.Ct. 1354 (2004), held that a defendant's Sixth Amendment right of confrontation was denied when his wife's statement was admitted. The Court held the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53-54. While declining to define "testimonial," the Court held that the term, at a minimum, includes "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68. Because the defendant did not have the opportunity to cross-examine his wife during her police interrogation, the Court

held that admission of the interrogation statements violated the defendant's Sixth Amendment right to confrontation. 541 U.S. at 68-69.

His wife was **unavailable** and the statement was found to possess a sufficient indicia of reliability, but since it was **testimonial** the procedural guarantee of confrontation precluded admission. The *Crawford* court held that the confrontation clause must be interpreted with the historical inference that the principal evil of which the clause was directed was that ex parte communications should not be admitted as evidence against an accused unless the defendant had a prior opportunity for cross examination.

The defendant notes that even if the court deems the statement to be admissible under a hearsay exception, our U.S. Supreme Court has often found that a constitutional violation still has occurred. Hearsay exceptions, even if arguably recognized under the rules of evidence, do not completely overlap confrontation clause issues. See *California v. Green*, 399 U.S. 149, 90 S.Ct. 1130(1970).

Additionally, the hearsay is inadmissible under his due process right of confrontation as applicable to revocation proceedings under *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). *Morrissey* held that due process requires an informal notice-and-hearing procedure prior to parole revocation, and that this includes (among other things) the "right to confront and cross-examine witnesses (unless the hearing officer specifically finds *good cause* for not allowing confrontation) [.]" *Morrissey*, 408 U.S. at 489, 92 S.Ct. 2593.

In, *Davis v. Washington*, 547 U.S. 813 (2006), the USSC held that hearsay statements made in a 911- call asking for aid was not "testimonial" in nature and thus their introduction at trial did not violate the Confrontation Clause as defined in *Crawford*. In *Davis v Washington*, and in *Hammon v Indiana*, 547 U.S. ____ (2006) (both decided June 19, 2006), the Court held that statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. It is the trial judge who will ultimately make the decision as to admissibility, applying this objective test as to the primary purpose for the questions.

A call to report a crime (especially when followed by questions and answers with an operator) is testimonial, but a call that asks for help may not be. See, *Richard D. Friedman & Bridget McCormack, Dial-In Testimony*, 150 Pa. L. Rev. 1171, 1240-42 (2002). But even in the latter situation, statements made in a call in the heat of the moment that say more than come help me should still be considered testimonial. *Id.*; *United States v. Arnold*, 410 F.3d 895 (6th Cir. 2005); *People v. Cortes*, 2004 N.Y. Slip Op. 24185, 2004 WL 1258018 (N.Y. Sup. Ct. 2004) (holding that 911 call was testimonial) ; *People v. Dobbin*, 2004 N.Y. Slip Op. 24534 (N.Y. Sup. Ct. 2004) (same); *People v. West*, 823 N.E.2d 82, 91-92 (Ill. App. 2005) (statements asking for immediate help are not testimonial but statements or responses to questions posed for the purpose of

collecting information useful to the criminal justice system are testimonial); *State v. Davis*, 111 P.3d 844 (Wash. 2005) (parts of 911 call seeking assistance and protection from peril are non-testimonial but those seeking to assist police in investigation or assist the State in prosecution testimonial) ; *State v. Powers*, 99 P.3d 1262 (Wash. App. 2004) (911 call to report domestic violence was testimonial) ; but see *United States v. Brito*, ___ F.3d ___, 2005 WL 2673671 (1st Cir. Oct 20, 2005) (anonymous 911 call to report crime and request help not testimonial).

In, *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856] (*Cunningham*), the U.S. Supreme Court held the court violated a defendant's constitutional right to a jury trial under the Sixth and Fourteenth Amendments by sentencing him to the upper term based on "aggravating factors that were not proven to a jury beyond a reasonable doubt."

Some circuits interpret *Morrissey* to require an **explicit finding of good cause** before admission of hearsay at a revocation hearing, and others have adopted a **balancing test** that requires the court to weigh the confrontation interest of the parolee/probationer against the interests of the government. *E.g.*, *United States v. Rondeau*, 430 F.3d 44, 47-48 (1st Cir.2005) (hearsay was admissible at revocation hearing only because **court determined** the hearsay was **reliable**, and that the government had a good reason not to produce declarants); *Barnes v. Johnson*, 184 F.3d 451, 454 (5th Cir.1999) ("[T]o fall within the good-cause exception to the right of confrontation at a parole revocation hearing[,] the hearing officer must make an **explicit, specific finding of good cause** and state the reasons for that finding. . . .

The hearing officer must weigh the parolee's interest in confronting the witness with the government's interest in denying the parolee that right."); *United States v. Martin*, 382 F.3d 840, 844 (8th Cir.2004) ("[T]o comport with *Morrissey v. Brewer*, the district court must balance the probationer's right to confront a witness against the grounds asserted by the government for not requiring confrontation.") (quotation marks and citation omitted); *United States v. Hall*, 419 F.3d 980, 986 (9th Cir.2005) ("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.") (quotation and citation omitted); *United States v. Frazier*, 26 F.3d 110, 114 (11th Cir. 1994) (in deciding whether to admit hearsay testimony at a revocation hearing, "the court must balance the defendant's right to confront adverse witnesses against the grounds asserted by the government for denying confrontation"). Other circuits do not require an explicit good cause finding or a balancing test. *See United States v. McCallum*, 677 F.2d 1024, 1025-26 (4th Cir.1982). (Emphasis added)

The United States Supreme Court, in *United States v. Burr*, 25 F. Cas. 187, 193 (U.S. Court of Appeals 1807), held:

The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than of him against whom the proceedings are instituted, *has been generally deemed all essential to the correct administration of justice.* (Emphasis added).

What then are the essentials of a Due Process standard for admitting non-testimonial hearsay? The common threads of *Due Process* decisional law are three - no trial by rumor, the capacity for adversarial testing, and reliability/probativeness established solely by the circumstances surrounding the making of the statement and not by reference to extrinsic corroboration. It is a consistent theme of nineteenth century decisional law that **hearsay and rumor** are inadmissible. See, e.g., *Carney v. State*, 84 Ala. 7, 10 (Ala. 1887) (hearsay of wife's infidelity insufficient to prove its occurrence and justify husband's abandonment of family); *Ashcraft v. De Armond*, 44 Iowa 229, 233 (Iowa 1876) (hearsay inadmissible to prove insanity); *People v. McQuaid*, 85 Mich. 123, 127-128 (Mich. 1891) (hearsay inadmissible to prove the cohabitation element of an "informal" marriage). Although criminal jurisprudence of the twentieth century expanded the use of hearsay, the essential precondition was "reliability." The Kansas Supreme Court described hearsay evidence as proof that "could be **easily manufactured**, and [is] clearly inadmissible..." *Blue v. Peter*, 40 Kan. 701, 718 (Kan. 1889) (emphasis added).

There should be no trial by rumor and unless the hearsay can be shown on the record to have a *very substantial reliability* it should not be admitted. No trial by rumor; the *capacity for adversarial testing*; and reliability/probativeness established solely by the circumstances surrounding the making of the statement and not by reference to extrinsic corroboration. Further, hearsay should be restricted to categories "whose conditions have proven over time 'to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath' and cross-examination at a

trial. At a revocation hearing **when hearsay is the only or primary evidence**, the indicia of reliability of hearsay evidence must be *substantial* in order to furnish legally sufficient grounds for revocation.

Wherefore, Defendant objects to the admissibility of the hearsay evidence in this proceeding.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

This is to certify that on the ____ day of _____, 20____, a true and correct copy of the above and foregoing Motion was hand delivered by the undersigned to the Tulsa County District Attorney's Office, 9thFloor- Tulsa County Court House, 500 S. Denver Ave., Tulsa, Oklahoma.

By: _____
Glen R. Graham