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Trading Defendants' Rights for Victims' Rights: A Due Process Right to Confrontation at Preliminary Examination After Proposition 115

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TRADING DEFENDANTS' RIGHTS FOR VICTIMS' RIGHTS: A DUE
PROCESS RIGHT TO CONFRONTATION AT PRELIMINARY
EXAMINATION AFTER PROPOSITION 115

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INTRODUCTION

In 1990, California voters passed Proposition 115, the Crime Victims Justice Reform Act.¹ Proposition 115 brought new statutory and constitutional provisions, drastically re-shaping the California criminal justice system.² The initiative came as a response to

1. Crime Victims Justice Reform Act, Initiative Measure Prop. 115 (approved June 5, 1990) (codified at CAL. CONST. art. I, §§ 14, 24, 29, 30; CAL. CIV. PROC. CODE § 223 (West 2006); CAL. EVID. CODE § 1203.1 (West 1995); CAL. PENAL CODE §§ 189, 190.2, *declared unconstitutional* by *People v. Sanders*, 797 P.2d 561, 589 (Cal. 1990), 190.41, 190.5, 206, 206.1, 859, 866, 871.6, 872, 954.1, 987.05, 1049.5, 1050.1, 1054, 1054.1, 1054.2, 1054.3, 1054.4, 1054.5, 1054.6, 1054.7, 1385.1, 1511 (West 2014)) [hereinafter “Proposition 115”].

2. Proposition 115 included provisions making certain types of hearsay admissible at preliminary examination. Additionally, it expanded the definition of first degree murder; added to the list of special circumstances that make an individual eligible to receive the death penalty; and amended discovery, appointment of counsel, severability, and speedy trial provisions. *See* CAL. CONST. art. I, § 30(b) (allowing hearsay at preliminary examination); CAL. CONST. art. I, §

California Supreme Court decisions, lower appellate decisions, and statutory provisions that expanded the rights of the criminally accused.³ Proponents of Proposition 115 sought to restore victims' rights in the criminal process by using the legislative process to override these decisions and take newly, "unnecessarily expanded" rights away from the criminally accused.⁴ One such right: confrontation at preliminary examination.⁵

Until 1990, California courts⁶ and statutory law⁷ provided that criminal defendants had a right to confront and cross-examine adverse

30(c) (requiring reciprocal discovery); CAL. CONST. art. I, § 29 (vesting speedy trial rights in the California people); CAL. PENAL CODE § 189 (delineating types of first degree murder) (West 2014); CAL. PENAL CODE § 190.2 (proscribing the penalty for murder with special circumstances as death or life in prison without parole, and listing such special circumstances) (West 2014); CAL. PENAL CODE § 987.05 (describing process for appointment of defense counsel) (West 2014); CAL. PENAL CODE § 1050.1 (limiting the court's discretion to sever multi-defendant cases) (West 2014). The Proposition further sought to strike a portion of Article I, section 24, which read: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution," and replace it with language limiting criminal defendants' rights to no greater rights than those afforded by the federal Constitution. The California Supreme Court held this amendment was invalid because it vested all power to interpret fundamental rights in the United States Supreme Court. The Court also noted the extreme ideological shift taking place, noting that the original Article I, section 24 frequently served as the basis for extending protections beyond the limitations of the Federal Constitution. *See Raven v. Deukmejian*, 801 P.2d 1077, 1087-90 (Cal. 1990).

3. Proposition 115, *supra* note 1, § 1(b) ("These [California Supreme Court] decisions and statutes have unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution.").

4. *Id.*

5. This comment uses the term "preliminary examination" to denote the pre-trial hearing that must precede felony prosecution by information in California. California courts use the terms "preliminary examination" and "preliminary hearing" interchangeably; however, the general phrase "preliminary hearing" has significance in many other contexts (such as the federal trial and parole revocation proceedings) and will not be used to describe California's pre-trial probable cause hearing.

6. *See Jones v. Super. Ct.*, 483 P.2d 1241, 1245 (Cal. 1971) (at preliminary examination, defendant "has the right to examine and cross-examine witnesses for the purpose of overcoming the prosecution's case"); *Jennings v. Super. Ct.*, 428 P.2d 304, 310 (Cal. 1967) (cross-examination of prosecution witnesses at preliminary examination "should be given wide latitude"); *People v. Harris*, 212 Cal. Rptr. 216, 221 (Cal. Ct. App. 1985) (right to confrontation applies at preliminary examination);

witnesses at preliminary examination. Proposition 115 took away this right and amended the California Constitution to include Article I section 30(b).⁸ The constitutional amendment made hearsay evidence⁹ admissible at preliminary examinations, “in order to protect victims and witnesses in criminal cases.”¹⁰ The initiative also included a vehicle for this newly admissible hearsay—revised Penal Code section 872(b).¹¹ This section allows law enforcement officers with specified training or experience to offer hearsay statements during the preliminary examination in lieu of the hearsay declarant’s live testimony.¹² As a result, criminal defendants lost the opportunity to test the credibility or reliability of accusatory statements made at the preliminary examination,¹³ a right previously regarded as “essential” to due process.¹⁴

People v. Haney, 202 Cal. Rptr. 579, 583 (Cal. Ct. App. 1984) (“the right of cross-examination at the [preliminary] hearing is a fundamental right”); Herbert v. Super. Ct., 172 Cal. Rptr. 850, 852 (Cal. Ct. App. 1981) (“right to confrontation is a substantial right,” even at preliminary examination); Gallaher v. Super. Ct., 162 Cal. Rptr. 389, 391 (Cal. Ct. App. 1980) (right to confrontation at preliminary examination is “essential” to Fourteenth Amendment due process of law).

7. CAL. PENAL CODE § 872(b) (1981) (current version at CAL. PENAL CODE § 872 (West 2008), amended by Proposition 115 (1990)).

8. Proposition 115, *supra* note 1, § 5.

9. “Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” CAL. EVID. CODE § 1200(a) (West 2014).

10. CAL. CONST. art. I, § 30(b).

11. CAL. PENAL CODE § 872(b).

12. *Id.* A law enforcement officer is qualified to testify to hearsay if he or she has five years of experience or has completed training offered by the Commission on Peace Office Standards and Training (“POST”). This course includes “training in the investigation and reporting of cases and testifying at preliminary hearing.” *Id.* Appellate courts have strictly construed this requirement. *See* Hollowell v. Super. Ct., 4 Cal. Rptr. 2d 321 (Cal. Ct. App. 1992).

13. Proposition 115 added Evidence Code § 1203.1, making Evidence Code § 1203 inapplicable to preliminary examination. Evidence Code § 1203 provides that an adverse party may call hearsay declarants for cross-examination concerning their admitted statements. *See* CAL. EVID. CODE §§ 1203, 1203.1 (West 2014).

14. *See* Gallaher v. Super. Ct., 162 Cal. Rptr. 389, 391 (Cal. Ct. App. 1980) (right to confrontation at preliminary examination is “essential” to Fourteenth Amendment due process of law).

This comment explores how Proposition 115 violates fundamental due process rights of confrontation at preliminary examination and proposes that a due process balancing test must be applied when determining whether hearsay testimony is admissible at preliminary examination. Part I gives an overview of the purpose of preliminary examination in California and the confrontation rights that existed before Proposition 115's enactment. Part II provides an analysis of Proposition 115's hearsay provisions, the case law upholding the provisions, and the subsequent expansion of the provisions' application to witness testimony and co-defendant statements. Part III scrutinizes the California Supreme Court's dismissal of constitutional confrontation challenges to Proposition 115's hearsay provisions and provides a basis for finding that due process confrontation rights should apply at preliminary examination. Part IV demonstrates how the due process balancing test would apply in determining the admissibility of hearsay at preliminary examination, using the United States Supreme Court's parole revocation hearing analysis as an example. Part V briefly discusses the negative impact Proposition 115's constitutional and statutory provisions may have on former testimony rules.

I. THE FUNCTION OF PRELIMINARY EXAMINATION IN CALIFORNIA

The California Constitution prescribes two methods of initiating felony criminal proceedings against an individual: indictment and information.¹⁵ The prosecutor has sole discretion in deciding how to proceed.¹⁶ The purpose of both processes is to ensure there is

15. CAL. CONST. art. I, § 14. Generally, the difference between indictment and information is who makes the probable cause finding. When a prosecutor proceeds by indictment, the grand jury is charged with making the probable cause determination. If it does, the pleading submitted to the court is the indictment. *See* CAL. PENAL CODE § 889 (West 2014); *People v. Petrilli*, 172 Cal. Rptr. 3d 480, 486 (Cal. Ct. App. 2014). Alternatively, a prosecutor may proceed by information by filing a formal complaint with a Magistrate. The Magistrate is charged with making a probable cause determination at a preliminary examination. If it does, the pleading the prosecutor files with the court is the felony information. *See* CAL. PENAL CODE § 739 (West 2008).

16. *Hawkins v. Super. Ct.*, 586 P.2d 916, 921 (Cal. 1978) (the prosecutor has "completely unfettered discretion" in choosing to prosecute by indictment or

probable cause to believe an individual is guilty of a felony before forcing the individual to stand trial.¹⁷ An individual prosecuted by information is automatically entitled to have a magistrate make this determination at a preliminary examination.¹⁸ This preliminary examination provides a wide array of procedural safeguards.¹⁹

A. The Probable Cause Finding Required Before Prosecution by Information

In California, before a prosecutor can file an information²⁰ bringing felony charges against a defendant, a magistrate must find probable cause to require the defendant to answer at trial.²¹ The preliminary examination follows the first arraignment²² and is the first time in the criminal prosecution that a magistrate makes a probable

information), *superseded by constitutional amendment on other grounds*, CAL. CONST. art. I, § 14.1, *as stated in* *Strauss v. Horton*, 207 P.3d 48, 75 (Cal. 2009).

17. CAL. PENAL CODE §§ 872, 917 (West 2008).

18. *See* CAL. CONST. art. I, § 14 (defendant may be prosecuted by information only *after examination and commitment by a Magistrate*). On the other hand, when an individual is prosecuted by indictment, a grand jury makes the probable cause finding and there is no preliminary hearing before a Magistrate. *See Greenburg v. Super. Ct.*, 121 P.2d 713, 715 (Cal. 1942).

19. Procedural rights at preliminary examination include the right to counsel, confrontation, a public hearing, and to present evidence. *See infra* notes 25-27; *Johnson v. Super. Ct.*, 539 P.2d 792, 797 (Cal. 1975) (Mosk, J., concurring).

20. An “information” is the charging document filed with the court following the Magistrate’s probable cause determination. The initial accusatory pleading is called the “complaint.” 20A CAL. JUR. 3D *Criminal Law Pretrial Proceedings* § 737 (2014).

21. CAL. PENAL CODE § 872 (West 2008). This is distinct from the federal system and many other states. The Federal Constitution does not require a probable cause finding at this stage. *See Lem Woom v. Oregon*, 229 U.S. 586 (1913); *Hurtado v. California*, 110 U.S. 516 (1884); *infra* Part III.D. Prosecution by information was historically frowned upon because of the lack of checks on the prosecution—preliminary examination serves this purpose. *See Johnson*, 539 P.2d at 799.

22. At arraignment, the defendant is brought before a Magistrate who must inform him of the charges against him and of his right to counsel at every stage of the proceeding. The validity of the arrest is not reviewed at this stage. CAL. CONST. art. I, § 14.

cause finding.²³ At this hearing, the defendant has the right to counsel,²⁴ to cross-examine the prosecution's witnesses,²⁵ to be present,²⁶ and to present evidence that is exculpatory, establishes an affirmative defense, or impeaches a prosecution witness.²⁷ Historically, prosecution by information was viewed with skepticism because it represented the prosecutor's unchecked charging power.²⁸ The preliminary examination did not take on the role of a judicial inquiry into the merits of the case until the mid-1800s.²⁹ The purpose of the modern preliminary examination is "to weed out groundless or unsupported charges of grave offenses."³⁰

B. Confrontation at Preliminary Examination Before Proposition 115

Before Proposition 115, various California appellate decisions held that confrontation rights applied at preliminary examination,³¹

23. It is important to note the distinction between California and federal processes at this stage. In the federal system, before a defendant appears for preliminary examination, he has already appeared at a *Gerstein* hearing and made an initial appearance. The purpose of the *Gerstein* hearing is to determine whether there was probable cause for *arrest*. This is separate and distinct from the determination made at preliminary examination, which is whether there is sufficient evidence to believe the defendant is guilty of a felony. *Infra* Part III.C.

24. The United States Supreme Court has held that a defendant is just as much entitled to counsel at the preliminary hearing as he is at trial, in order to protect the defendant from groundless prosecution. *See Coleman v. Alabama*, 399 U.S. 1, 10 (1969).

25. *See* CAL. PENAL CODE § 865 (West 2008) (permitting cross-examination on the defendant's behalf); *see also* cases cited *supra* note 6.

26. *See* CAL. PENAL CODE § 865 (requiring defendant's presence during witness examination).

27. *See* CAL. PENAL CODE § 866 (West 2008) (permitting testimony of defense witnesses if it establishes an affirmative defense, negates an element of a charged crime, or impeaches the testimony of a prosecution witness).

28. *Johnson v. Super. Ct.*, 539 P.2d 792, 799 (Cal. 1975) (Mosk, J., concurring).

29. *Id.*

30. *Jaffe v. Stone*, 114 P.2d 335, 338 (Cal. 1941).

31. *See* cases cited *supra* note 6; *see also* *Stevenson v. Super. Ct.*, 154 Cal. Rptr. 476, 479 (Cal. Ct. App. 1979) ("[T]he right to confrontation is not limited to the trial stage of proceedings. Rather, it extends to any stage when there are witnesses to be questioned.").

and the rules of evidence applied at preliminary examination generally the same way they apply at trial.³² Hearsay was permissible at preliminary examination in the form of written statements in lieu of live testimony, *unless* the witness was a victim of a crime to his or her person or would be providing testimony amounting to eyewitness identification of the defendant.³³ For example, under these rules, the prosecutor could submit as evidence at preliminary examination a written statement by an individual whose car was vandalized, so long as that individual did not observe the defendant committing the crime and would not be identifying the defendant at trial. Proposition 115 turned these rules on their heads.³⁴

1. Former Penal Code Section 872(b), A Statutory Right to Confrontation

In 1981, the California legislature enacted Penal Code sections 872(b) and (c),³⁵ providing that the preliminary examination probable cause finding could be based on “hearsay evidence in the form of written statements of witnesses in lieu of testimony,” *except where* “the witness is a victim of a crime against his or her person, or the testimony of the witness includes eyewitness identification of a defendant.”³⁶ Further, in order to offer the written statement as evidence at the preliminary examination, section 872(b) required the prosecutor to provide the defendant with a copy of the statement either

32. In fact, California courts held constitutional due process of law required the same rules of evidence at each hearing. *See* *People v. Schuber*, 163 P.2d 498, 499 (Cal. 1945) (“There cannot be one rule of evidence for the trial of cases and another rule of evidence for preliminary examinations.”).

33. Before Proposition 115, the out of court statements of eyewitnesses and victims of crimes were not admissible. *See* CAL. PENAL CODE § 872(b) (1981) (current version at CAL. PENAL CODE § 872 (West 2008)), *amended by* Proposition 115 (1990); *Mills v. Super. Ct.*, 728 P.2d 211, 212 n.1 (Cal. 1986), *overruled by* Proposition 115 as stated in *Whitman v. Super. Ct.*, 820 P.2d 262 (Cal. 1991).

34. Proposition 115 brought statutory and constitutional amendments to specifically allow the out of court statements of witnesses to and victims of crimes. *See* sources cited *supra* note 33.

35. CAL. PENAL CODE § 872 (1981). Proposition 115 deleted and replaced subsection (b) in its entirety, and deleted subsection (c). *See id.* A 2013 revision codified the definition of “law enforcement officer” for purposes of this section. *Id.*

36. *Id.* § 872(b)(1981).

at arraignment or at least ten days before the preliminary examination.³⁷

Penal Code section 872(c) allowed the defendant to call as a witness for cross-examination the declarant whose written statement the prosecutor offered into evidence.³⁸ The section further provided that the court must require the prosecutor to make the witness available for cross-examination if the defendant made "reasonable efforts to secure the attendance of the witness but [was] unsuccessful"³⁹ If the prosecutor did not present the witness, the witness's written statement was not accepted as evidence.⁴⁰

These sections guaranteed defendants the right to cross-examine, at a minimum, the eye witnesses and victims of any crime of which he was accused.⁴¹ In other words, under no circumstances could a prosecutor introduce hearsay statements of any person who would be identifying the defendant as the perpetrator.⁴² In addition, if the prosecutor intended to introduce hearsay in lieu of live testimony from extraneous witnesses, the defendant could elect to cross-examine those hearsay declarants. Under the 1981 amendment to Penal Code section 872, criminal defendants could not be denied the right to cross-examine adverse witnesses at preliminary examination.⁴³

37. *Id.*

38. *Id.* § 872(c).

39. *Id.*

40. *Id.*

41. An extremely important distinction, as Proposition 115 named these specific individuals as those it aimed to protect. California law no longer differentiates between hearsay statements made by eyewitnesses, victims, or any other witness. *See id.* § 872.

42. The exclusion of eyewitnesses and victims as permissible hearsay declarants appears to be rooted in traditional reliability principles. *See generally* *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004). The United States Supreme Court notes "the Framers' preference for face-to-face accusation," explaining that the Sixth Amendment requires the prosecution to produce live witnesses or demonstrate their unavailability. *Roberts*, 448 U.S. at 65. It is important to note that *Roberts* involved confrontation issues at trial; however, under former Penal Code section 872(b), the rules against hearsay were the same at preliminary examination as they are at trial, at least for statements by eyewitnesses and victims. *See supra* note 32.

43. *E.g.*, *Mills v. Super. Ct.*, 728 P.2d 211, 212-16 (Cal. 1986), *superseded by constitutional amendment*, CAL. CONST. art. I, § 30.

2. *Constitutional Challenges to Former Penal Code Section 872*

In the years following the enactment of former Penal Code sections 872(b) and (c), California courts were faced with deciding the constitutionality of section 872(c)'s "reasonable efforts" requirement. In *People v. Harris*, a California court of appeal decided the sections were constitutional because they "establish[] a means whereby an opportunity for cross-examination is *guaranteed*."⁴⁴ In determining whether confrontation rights are violated, the court stated, "it is the opportunity for cross-examination that is the controlling factor."⁴⁵ The court calls cross-examination the "primary interest" of the right of confrontation.⁴⁶

The California Supreme Court had a different opinion. In *Mills v. Superior Court*, the court described confrontation rights at preliminary examination as "fundamental procedural rights" that legislation could not restrict without being subject to "careful scrutiny."⁴⁷ Upon reviewing former Penal Code sections 872(b) and (c), the court held the "reasonable efforts" requirement violated due process because it placed a substantial burden on the defendant by requiring the defendant to procure prosecution witnesses, effectively allowing some hearsay testimony to be admitted without being subject to cross-examination.⁴⁸ The court pointed out that no other evidence code section allowed substitute written testimony when a witness is alive and available to appear.⁴⁹ This type of liberal interpretation of criminal defendants' rights prompted a drastic shift in the California criminal justice system,⁵⁰ and four years after *Mills v. Superior Court*, Proposition 115 was born.

II. PROPOSITION 115, THE CRIME VICTIMS JUSTICE REFORM ACT

Proposition 115's stated purpose was to restore balance and fairness to California's criminal justice system by creating a system

44. *People v. Harris*, 212 Cal. Rptr. 216, 226 (Cal. Ct. App. 1985).

45. *Id.* at 223.

46. *Id.*

47. *Mills*, 728 P.2d at 214.

48. *Id.* at 215-16.

49. *Id.* at 216.

50. *See infra* text accompanying notes 51-53.

that treats victims and witnesses carefully and respectfully.⁵¹ The initiative declared, “the rights of crime victims are too often ignored,”⁵² and expressed a need to redress California Supreme Court decisions that “unnecessarily expanded the rights of accused.”⁵³ Similarly, the constitutional amendment allowing hearsay at preliminary examinations declared its motive: “to protect victims and witnesses in criminal cases.”⁵⁴ Unfortunately, in its efforts to protect victims’ rights, the California legislature has encroached upon the rights of the criminally accused.

Section 18 of Proposition 115 deleted former Penal Code sections 872(b) and (c) and replaced section (b) to provide that the preliminary examination probable cause finding “may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court and offered for the truth of the matter asserted.”⁵⁵ This section no longer distinguishes the out of court statements of victims or witnesses to crimes,⁵⁶ and it strips defendants of the right to cross-examine hearsay declarants.

One year after Proposition 115 became law, the California Supreme Court heard *Whitman v. Superior Court*, a case raising state and federal constitutional challenges to the new hearsay provisions.⁵⁷ The court deemed the provisions constitutional.⁵⁸ Following *Whitman*, the California Supreme Court expanded Proposition 115’s hearsay provisions to include officer testimony relating the out of court statements of expert witnesses and co-defendants, in *Hosek v.*

51. Proposition 115, *supra* note 1, § 1(a).

52. *Id.*

53. *Id.* Before Proposition 115, Article I, Section 24 of the California Constitution served as a vehicle for expanding federal constitutional rights. It read, “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.” Proposition 115 amended Article I, Section 24 to read, in pertinent part, “This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States” The California Supreme Court subsequently held this was an invalid limitation on judicial power and the individual force of the California constitution. *See Raven v. Deukmejian*, 801 P.2d 1077, 1087-90 (Cal. 1990).

54. Proposition 115, *supra* note 1, § 5.

55. *Id.* § 18.

56. *See supra* Part I.B.1.

57. *Whitman v. Super. Ct.*, 820 P.2d 262 (Cal. 1991).

58. *Id.*

*Superior Court*⁵⁹ and *People v. Miranda*,⁶⁰ respectively. In 2010, the Ninth Circuit Court of Appeal heard a similar case, challenging the hearsay provisions of Proposition 115 under the Federal Constitution.⁶¹ The Ninth Circuit agreed with the California Supreme Court that Proposition 115 is constitutional under the Federal Constitution.⁶²

A. *Whitman v. Superior Court, Confrontation After Proposition 115*

1. Introduction

Whitman v. Superior Court brought the first challenge to Proposition 115's hearsay provisions.⁶³ Whitman faced multiple felony Vehicle and Health and Safety Code violations.⁶⁴ At Whitman's preliminary examination, the prosecutor called a law enforcement officer as the sole witness.⁶⁵ The officer was not an arresting or investigating officer in the case, and had no personal knowledge of the charges against Whitman.⁶⁶ However, because he had eight years of law enforcement experience, the officer was qualified to testify to hearsay.⁶⁷ Throughout the preliminary examination, the officer revealed he had not discussed the incident with the investigating officer, did not know the reporting officer, and first became aware of the incident the morning of the hearing.⁶⁸ The officer was nonetheless allowed to testify to the contents of the investigating officer's report, and to give an opinion as to whether the testifying officer believed Whitman was under the influence based on the contents of the investigating officer's report.⁶⁹ The trial court found probable cause, holding Whitman to answer on the charges at

59. *Hosek v. Super. Ct.*, 12 Cal. Rptr. 2d 650 (Cal. 1992); *see infra* Part II.B.

60. *People v. Miranda*, 1 P.3d 73 (Cal. 2000); *see infra* Part II.C.

61. *Peterson v. California*, 604 F.3d 1166 (9th Cir. 2010).

62. *Id.*

63. *See Whitman*, 820 P.2d 262.

64. *Id.* at 264.

65. *Id.*

66. *Id.*

67. *Id.* *See also supra* note 12.

68. *Whitman*, 820 P.2d at 264.

69. *Id.*

trial despite the testifying officer's lack of personal knowledge and inability to identify Whitman as the defendant.⁷⁰

2. *Constitutional Challenges*

Whitman raised federal constitutional challenges to the relevant provisions of Proposition 115.⁷¹ He argued, unsuccessfully, that the use of hearsay testimony at his preliminary examination violated his Sixth Amendment rights to confrontation and cross-examination.⁷² The court rejected Whitman's Confrontation Clause challenge, citing two reasons why the right to confrontation does not extend to preliminary examination: (1) there is no right to this hearing,⁷³ and (2) the right to confrontation is a trial right.⁷⁴ This comment discusses the court's analysis in detail in Part III.

3. *Statutory Interpretation*

Whitman further argued that the language of Proposition 115 should not be read to permit the hearsay statements of police officer declarants.⁷⁵ The court also rejected this argument, holding that a statute should not be given literal meaning if doing so would result in "absurd consequences," and the statute should instead be read "as to conform to the spirit of the act."⁷⁶ Ironically, in deciding how to interpret the statute according to the "spirit of the act," the court ignores the qualifying language, "in order to protect victims and witnesses," and simply relies on the definition of "declarant" as provided by California Evidence Code section 135, finding that

70. *Id.* at 265.

71. *Id.*

72. *Id.* Whitman raised additional challenges under the Federal and California Constitutions not pertinent to the discussion in this comment. *See id.* at 273-74.

73. *Whitman*, 820 P.2d at 271.

74. *Id.* (citing *Barber v. Page*, 390 U.S. 719, 725 (1968)).

75. *Whitman*, 820 P.2d at 266.

76. *Id.* (citing *People v. Pieters*, 802 P.2d 420, 422 (Cal. 1991)). The court does not delve into examples of "absurd consequences," but does acknowledge its refusal to give the statute its literal meaning. *See Whitman*, 820 P.2d at 266.

Proposition 115 does not exclude any person as a declarant because a declarant is, quite literally, any person.⁷⁷

4. *Positive Result, Negative Implications*

Though the court rejected Whitman's statutory interpretation and constitutional challenges, it ultimately agreed that the officer's testimony was impermissible, holding that the probable cause determination cannot be based on the testimony of a non-investigating officer "reader" who merely reads from an investigating officer's report⁷⁸ because "reader" testimony does not meet reliability standards.⁷⁹ With its narrow holding, the court passed on the perfect opportunity to limit Proposition 115 testimony to those statements made by crime victims and witnesses needing protection. Instead, the court held the testifying officer would be permitted to relay information contained in the investigating officer's report if the testifying officer had sufficient knowledge of the case.⁸⁰

77. *Id.* at 267 (citing CAL. EVID. CODE § 135 (West 2011) ("a person who makes a statement")). This linguistic analysis requires looking at both the constitutional amendment and the revised Penal Code section. The constitutional provision reads in pertinent part: "In order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings, as prescribed by the Legislature or by the people through the initiative process." CAL. CONST. art. I, § 30(b). The prescription came in the revision of Penal Code section 872(b): "the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer . . . relating the statements of declarants made out of court offered for the truth of the matter asserted." CAL. PENAL CODE § 872(b) (West 2008). The court's general finding that law enforcement officers may relay the out of court statements of *all* declarants ignores the caveat put in place by the constitutional amendment, that hearsay evidence is admissible at preliminary examination for the limited purpose of protecting victims and witnesses.

78. *Whitman*, 820 P.2d at 267.

79. *Id.* at 268 (citing *Ohio v. Roberts*, 448 U.S. 56, 63-65 (1980)). The court's reliance on *Roberts* is problematic in light of *Crawford v. Washington*, an issue not discussed in this comment. See generally Jay Stoegbauer, *Proposition 115 After Crawford v. Washington: It Is Time to Revisit the Constitutionality of Police Officer Hearsay Testimony in Preliminary Hearings*, 34 W. ST. U. L. REV. 143 (2007) (proposing *Whitman* holding is outdated because statements made to police officers are testimonial and require full cross-examination in light of *Crawford v. Washington*).

80. *Whitman*, 820 P.2d at 267.

One officer testifying for another only serves efficiency purposes, not to protect crime victims and witnesses, and seems to be the type of “absurd consequence” the California Supreme Court cautioned against. Since *Whitman*, the hearsay provision has been extended beyond police officers, to include expert witnesses⁸¹ and accomplices⁸² as permissible hearsay declarants, none of which should be included in the narrow category, “crime victims and witnesses.”⁸³

B. *Hosek v. Superior Court, Experts as Hearsay Declarants*

One year after *Whitman*, in *Hosek v. Superior Court*, a California Court of Appeal decided that a qualified law enforcement officer could testify to a forensic expert's out of court statements, without ever mentioning the express purpose of Proposition 115.⁸⁴ In *Hosek*, the defendant was transported to a hospital to have her blood drawn after a law enforcement officer suspected she was driving under the influence.⁸⁵ The officer sent the blood sample to a crime lab to be tested for alcohol content.⁸⁶ The day of the preliminary examination, the officer phoned the criminalist who tested the blood sample, interviewed him, and was permitted to testify to the criminalist's results.⁸⁷ The defendant was held on the charges, despite the officer's testimony on cross-examination that he had never seen the testing device, did not know how the device measured blood alcohol, and did not know how the device guaranteed reliability.⁸⁸

On appeal, the defendant argued that the hearsay exception Proposition 115 created should not extend to out of court statements

81. See *infra* Part II.B.

82. See *infra* Part II.C.

83. CAL. PENAL CODE § 872(b) (1990). While the California Supreme Court gives plain meaning to the word “witness” as describing any person who offers live testimony, the legislative intent can be inferred from the previous version of Penal Code § 872(b), drawing a distinction between eyewitnesses of and victims to crimes, and ordinary lay witnesses. See *supra* note 33.

84. *Hosek v. Super. Ct.*, 12 Cal. Rptr. 2d 650 (Cal. 1992).

85. *Id.* at 651.

86. *Id.*

87. *Id.*

88. *Id.*

made by expert witnesses, and that the testifying officer did not have sufficient personal knowledge to assure the reliability of the expert's statements.⁸⁹ The court held that neither *Whitman* nor Proposition 115 exclude expert witness statements from Penal Code section 872(b) permissible hearsay.⁹⁰ The court's reasoning was similar to the *Whitman* court's—an expert is a declarant in the same way a police officer or a layperson is a declarant.⁹¹ This certainly contradicts the purpose of Proposition 115. The title of the measure, the Crime Victims Justice Reform Act, coupled with the language of the constitutional and statutory provisions, suggests that hearsay should be permitted via qualified law enforcement officers when the safety of a victim or a witness to a crime might be compromised. Further, expert testimony raises additional reliability concerns⁹² that a defendant loses the opportunity to challenge when the expert is not required to testify at the preliminary examination.

C. *People v. Miranda, Co-Defendant Accomplices as Hearsay Declarants*

Though the *Whitman* court expressly identified reliability as the threshold test for the admissibility of Proposition 115 testimony, in 2000, the California Supreme Court held out of court accomplice confessions are permissible at preliminary examination when offered by a qualified law enforcement officer, despite the inherent unreliability of these statements.⁹³ In *Miranda*, multiple defendants were charged with murder.⁹⁴ At their joint preliminary examination, an investigating officer testified about one co-defendant's confession

89. *Id.* at 652.

90. *Id.* (“on the face of section 872 there is no limitation whatsoever on the ‘declarants’ whose extrajudicial statements may be received in evidence in a preliminary examination”).

91. *Id.*

92. See generally *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *People v. Kelly*, 549 P.2d 1240 (Cal. 1976).

93. *People v. Miranda*, 1 P.3d 73, 79-80 (Cal. 2000) (noting that the inherent unreliability of accomplice confessions goes to the weight of the statement, not its admissibility).

94. *Id.* at 74.

that implicated the other defendants.⁹⁵ The prosecutor stated he intended to use the statements as Proposition 115 testimony and asked the magistrate to attribute the confession to all defendants, not just to the declarant defendant.⁹⁶ The magistrate ruled that the co-conspirator statement, communicated through the investigating officer, could not be used against the other defendants at the preliminary examination, and subsequently granted the non-declarant defendants' motion to dismiss.⁹⁷ The prosecutor's motion to reinstate the complaint against defendant Miranda was denied, and the prosecutor appealed.⁹⁸

On appeal, Miranda raised federal constitutional challenges to Proposition 115, by arguing accomplice confessions should not be admissible as Proposition 115 testimony because the statements are inherently untrustworthy.⁹⁹ Citing a previous decision permitting magistrates to rely on accomplice testimony to find probable cause,¹⁰⁰ the California Supreme Court held that the magistrate could consider the co-defendant's confession—offered via law enforcement officer as Proposition 115 testimony—despite their inherent unreliability.¹⁰¹

Miranda is significant because the *Whitman* decision was based on the reliability of the officer's testimony.¹⁰² In a situation akin to *Whitman* where one officer testifies in the absence of another, assuming the testifying officer has personal knowledge, there are no indicia of unreliability—there is no motive to fabricate. The same is not true for accomplice confessions.¹⁰³ The *Miranda* court reasoned,

95. *Id.*

96. *Id.* at 76.

97. *Id.* at 77. The Magistrate reasoned that the *Aranda/Bruton* rule applied at preliminary examination. The *Aranda/Bruton* rule bars admitting co-defendant statements implicating the other defendant if the confessing co-defendant does not testify in court and is thus not subject to cross-examination. See *Bruton v. United States*, 391 U.S. 123 (1968); *People v. Aranda*, 407 P.2d 265 (Cal. 1965), *superseded by statute on another ground, as stated in People v. Fletcher*, 917 P.2d 187, 194 (Cal. 1996).

98. *Miranda*, 1 P.3d at 77.

99. *Id.* at 78-79.

100. *Id.* at 79 (citing *People v. McRae*, 187 P.2d 741 (Cal. 1947)).

101. *Miranda*, 1 P.3d at 79.

102. *Whitman v. Super. Ct.*, 820 P.2d 262, 266-68 (Cal. 1991).

103. See *In re Mitchell P.*, 587 P.2d 1144, 1148 (Cal. 1978). "Accomplice testimony is generally suspect because it may have been proffered in the hope of

however, that a magistrate is aware of the potential untrustworthiness of accomplice confessions and is able to afford the statements appropriate weight in making probable cause determinations.¹⁰⁴ For this reason, the court determined accomplice statements implicating another defendant are admissible at preliminary examination, although they may never be admissible at trial.¹⁰⁵

California voters overwhelmingly approved Proposition 115,¹⁰⁶ embracing the initiative's promise of safety to the victims and witnesses of crimes by not requiring their live testimony at preliminary examination. This hearsay exception has been unjustifiably expanded to include police officers, expert witnesses, and accomplice co-defendants as hearsay declarants.

D. Peterson v. California, The Ninth Circuit Weighs In

In 2010, the Ninth Circuit considered the constitutionality of Proposition 115. In *Peterson v. California*, defendant Peterson filed a 42 U.S.C. § 1983 action in federal court, challenging Proposition 115 under the Sixth and Fourteenth Amendments.¹⁰⁷ Peterson was charged with several Health and Safety Code violations.¹⁰⁸ At his preliminary examination, the prosecution called the investigating officer as the sole witness and the magistrate bound Peterson over for trial.¹⁰⁹ A jury subsequently convicted him.¹¹⁰

leniency or immunity, and thus greater weight may be accorded such testimony than is warranted." *Id.*

104. *Miranda*, 1 P.3d 73 at 80.

105. *Id.* The accomplice confessions would not be subject to cross-examination at trial, thus inadmissible, if the defendant declarant invoked his privilege against self-incrimination at trial. The *Miranda* prosecutor admitted he did not have a case against *Miranda* if the accomplice co-defendant refused to testify at trial. *Id.* at 81.

106. Proposition 115 passed by 57% of the popular vote. *California Proposition 115, the "Crime Victims Justice Reform Act (1990)*, BALLOTPEdia, [http://ballotpedia.org/California_Proposition_115,_the_%22Crime_Victims_Justice_Reform_Act%22_\(1990\)](http://ballotpedia.org/California_Proposition_115,_the_%22Crime_Victims_Justice_Reform_Act%22_(1990)) (last visited Nov. 15, 2014).

107. *Peterson v. California*, 604 F.3d 1166, 1167-68 (9th Cir. 2010).

108. *Id.* at 1168.

109. *Id.*

110. *Id.* The felony counts against Peterson were dismissed before trial; Peterson was convicted of remaining misdemeanor counts. *Id.*

Whether hearsay testimony is permissible at preliminary examinations was a novel issue in the Ninth Circuit. Citing *Whitman*, the Ninth Circuit recognized Sixth Amendment confrontation rights do not extend to preliminary examination because the Federal Constitution does not guarantee a right to a preliminary examination, and the right to confrontation is a trial right.¹¹¹

The court also rejected Peterson's Fourteenth Amendment due process challenge, holding that permitting hearsay during preliminary examination does not deprive a defendant of due process.¹¹² The court reasoned that hearsay is permissible at grand jury indictments¹¹³ and due process protections at preliminary examination should not be greater than those afforded in grand jury proceedings.¹¹⁴ The Ninth Circuit dismissed Peterson's due process challenge on these grounds, without conducting the requisite due process analysis.¹¹⁵ This due process analysis is the subject of Part IV of this comment.

III. WHERE THE *WHITMAN* COURT FELL SHORT

The California Supreme Court rejected *Whitman*'s Confrontation Clause challenge for two separate reasons.¹¹⁶ First, the court reasons, there is no federal constitutional right to a preliminary examination

111. *Id.* at 1169.

112. *Id.* at 1171.

113. *See Costello v. United States*, 350 U.S. 359, 363-64 (1956).

114. *Peterson*, 604 F.3d at 1171 (“[I]f the phrase ‘due process of law’ in the Fifth Amendment does not prohibit the use of hearsay in grand jury proceedings, then the same phrase in the Fourteenth Amendment cannot be read to prohibit the use of hearsay evidence at a preliminary hearing.”).

115. *See generally Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (“consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action” (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961))).

116. *See supra* Part II.A.2.

because federal felonies are prosecuted by indictment.¹¹⁷ Second, in the court's view, the right to confrontation is a trial right.¹¹⁸

A. *The Sixth Amendment Confrontation Clause*

The Sixth Amendment Confrontation Clause guarantees, "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."¹¹⁹ The California Constitution provides a similar guarantee: "The defendant in a criminal cause has the right to . . . be confronted with the witnesses against the defendant."¹²⁰ The California Supreme Court declared Proposition 115 an exception to the broad confrontation rights granted by the California Constitution, requiring all challenges to this portion of the proposition be raised under the Federal Confrontation Clause.¹²¹ Thus, this section focuses only on the Federal Sixth Amendment right of confrontation, made applicable to the States through the Fourteenth Amendment.¹²²

"There are few subjects, perhaps, upon which [the United States Supreme] Court and other courts have been more nearly unanimous than in their expression of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."¹²³ The majority of Supreme Court Confrontation Clause jurisprudence has focused on how the right applies at trial.¹²⁴ However, the Court's right to counsel analysis demonstrates that the scope of this Sixth

117. *Whitman v. Super. Ct.*, 820 P.2d 262, 271 (Cal. 1991). *But see* *Hurtado v. California*, 110 U.S. 516 (1884) (holding that there is no right to indictment by a grand jury outside the federal system).

118. *Whitman*, 820 P.2d at 271 (citing *Barber v. Page*, 390 U.S. 719, 725 (1968)).

119. U.S. CONST. amend. VI.

120. CAL. CONST. art. I, § 15.

121. *Whitman*, 820 P.2d at 269.

122. *See Pointer v. Texas*, 380 U.S. 400, 403 (1965) (incorporating the Sixth Amendment right of confrontation to the States through the Fourteenth Amendment).

123. *Id.* at 402.

124. This is likely because the decision of which proceeding to use to make a probable cause determination is left up to each individual State. *See infra* Part III.D.

Amendment “trial right”¹²⁵ extends beyond the trial itself.¹²⁶ The Court’s decision that the right to counsel extends to preliminary examination was based primarily on the defendant’s opportunity to cross-examine at that stage.¹²⁷ To date, however, the Court has not held that full Sixth Amendment confrontation rights apply at preliminary examination.

B. The Right to Confrontation: More Than A Trial Right

In 1968, the United States Supreme Court decided *Barber v. Page*, giving birth to the oft-quoted assertion, “[t]he right to confrontation is basically a trial right.”¹²⁸ The *Whitman* Court relies on this quote, reading it on its face to mean that confrontation rights do not apply to any sort of pretrial hearings.¹²⁹ However, the *Barber* decision was not concerned with the defendant’s confrontation rights at his preliminary examination—in fact, the defendant *was* given the opportunity to cross-examine witnesses at that hearing.¹³⁰ The issue, rather, was whether an unavailable witness’s preliminary examination testimony was admissible at trial as a substitute for live testimony.¹³¹ The Court held the preliminary examination testimony was not an adequate substitute because the right to confrontation at trial is a fundamental right.¹³² Contrary to the *Whitman* court’s interpretation,¹³³ the United States Supreme Court did not limit confrontation rights as *only* applying at trial.

125. *Barber v. Page*, 390 U.S. 719, 795 (1968).

126. “Accordingly, the principle of *Powell v. Alabama* . . . requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant’s basic right to a fair trial as affected by his right meaningfully to cross examine the witnesses against him and to have effective assistance of counsel at the trial itself.” *Coleman v. Alabama*, 399 U.S. 1, 7 (1999).

127. *Id.* at 9.

128. *Barber*, 390 U.S. at 795. *See also* *Whitman v. Super. Ct.*, 820 P.2d 262, 271 (Cal. 1991).

129. *Whitman*, 820 P.2d at 271.

130. *Barber*, 390 U.S. at 722.

131. *Id.* at 720.

132. *Id.* at 725.

133. *Whitman*, 820 P.2d at 271.

C. California's Preliminary Examination as a Critical Stage

In upholding Proposition 115's narrowing of preliminary examination confrontation rights, the California Supreme Court likened the preliminary examination to a federal *Gerstein*¹³⁴ hearing.¹³⁵ In *Gerstein v. Pugh*, the United States Supreme Court decided the Federal Constitution requires a judicial determination of probable cause for arrest when a person is detained under a prosecutor's information.¹³⁶ However, the defendant is not entitled to "the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses," at this hearing.¹³⁷ The Court based this decision on an important distinction: the hearing's "limited function and nonadversary character."¹³⁸ The specific and exclusive purpose of the *Gerstein* hearing is to determine whether probable cause exists to detain the individual,¹³⁹ not to provide judicial review of the decision to prosecute.¹⁴⁰ The defendant's release following the federal *Gerstein* hearing does not mean he will not be prosecuted.¹⁴¹

By contrast, in California, the purpose of the preliminary examination *is* to determine whether probable cause exists to prosecute the individual.¹⁴² This distinction is important because a *Gerstein* hearing is not a critical stage.¹⁴³ California courts have repeatedly agreed that California's preliminary examination *is* a

134. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

135. *Whitman*, 820 P.2d at 271-73.

136. *Gerstein*, 420 U.S. at 105.

137. *Id.* at 119.

138. *Id.* at 121.

139. *Id.* at 120. Federal criminal procedure provides for a subsequent preliminary examination to determine whether sufficient evidence exists to hold the defendant for trial. See 18 U.S.C. § 3060 (1982); FED. R. CRIM. P. 5.1; Coleman v. Burnett, 477 F.2d 1187, 1198-99 (D.C. Cir. 1973) (purpose of preliminary hearing is to determine whether probable cause exists to proceed to trial).

140. *Gerstein*, 420 U.S. at 119. See also *Beck v. Washington*, 369 U.S. 541, 545 (1962) (a judicial hearing is not required before the Government may prosecute by information).

141. *Gerstein*, 420 U.S. at 123.

142. *Galindo v. Super. Ct.*, 235 P.3d 1, 3 (Cal. 2010).

143. *Gerstein*, 420 U.S. 103.

critical stage of prosecution where counsel is required.¹⁴⁴ In *Gerstein*, the United States Supreme Court distinguishes the hearing determining probable cause for arrest from the hearing designated for determination of probable cause to prosecute, as it examined in *Coleman v. Alabama*.¹⁴⁵ In *Coleman*, the issue before the Court was whether Alabama's preliminary hearing was a critical stage in the prosecution, requiring Sixth Amendment effective assistance of counsel.¹⁴⁶ The Court held Alabama's preliminary hearing was a critical stage. In *Gerstein*, the Court specifically referenced Alabama's preliminary hearing as distinct from a hearing determining probable cause for arrest, listing "two critical factors."¹⁴⁷ First, the function of Alabama's preliminary hearing was to determine whether sufficient evidence existed to charge the defendant with an offense.¹⁴⁸ Second, the Court gave particular attention to the fact that at preliminary hearing, the defendant was allowed to confront and cross-examine witnesses.¹⁴⁹ The fundamental right to counsel necessarily includes effective confrontation and cross-examination.¹⁵⁰

California's preliminary examination serves the exact same purpose as Alabama's preliminary hearing as examined in *Coleman* and *Gerstein*.¹⁵¹ Unlike the *Gerstein* hearing, a finding of no probable

144. *Jennings v. Super. Ct.*, 428 P.2d 304, 308-09 (Cal. 1967) (right to counsel at preliminary hearing is a substantial right); *People v. Lopez*, 384 P.2d 16, 27 (Cal. 1963) ("a defendant has the right to assistance of counsel . . . at the preliminary examination"); *People v. Harris*, 212 Cal. Rptr. 216, 222 (Cal. Ct. App. 1985) (preliminary examination is a critical stage of the prosecution); *People v. Johnson*, 91 Cal. Rptr. 203, 205 (Cal. Ct. App. 1970) (preliminary hearing is a critical stage under *Coleman*, requiring counsel). A critical stage is any pretrial procedure that "would impair defense on the merits if the accused is required to proceed without counsel." *Gerstein*, 420 U.S. at 122.

145. *Gerstein*, 420 U.S. 103; *Coleman v. Alabama*, 399 U.S. 1 (1970).

146. *Coleman*, 399 U.S. at 3.

147. *Gerstein*, 420 U.S. at 122 (citing *Coleman*, 399 U.S. at 1-25).

148. *Gerstein*, 420 U.S. at 123.

149. *Id.*

150. *United States v. Cronin*, 466 U.S. 648 (1984); *Davis v. Alaska*, 415 U.S. 308 (1974); *Washington v. Texas*, 388 U.S. 14 (1967).

151. Criminal defendant will be held to answer, "if it appears from the examination that a public offense has been committed, and there is sufficient cause to believe that the defendant is guilty." CAL. PENAL CODE § 872 (West 2008); see also *People v. Bomar*, 238 P. 758, 760 (Cal. Ct. App. 1925) ("Before any accused

cause at preliminary examination in California means the defendant cannot be prosecuted under the pending information.¹⁵² The *Whitman* court, nonetheless, held California's preliminary examination sufficiently resembles the *Gerstein* hearing.¹⁵³ However, since California guarantees the right to counsel at preliminary examination,¹⁵⁴ the right to effective cross-examination is both complementary and paramount. Indeed, the United States Supreme Court recognizes that cross-examination plays an integral role at preliminary examination: to influence a magistrate's decision to bind over a defendant on the charges he faces.¹⁵⁵

D. Preliminary Examination, An Alternative to Indictment

For decades in California, the overwhelming majority of felonies have been prosecuted by information.¹⁵⁶ More than one hundred years before Proposition 115 and *Whitman*, the United States Supreme Court held, in *Hurtado v. California*, that due process does not require the states to institute Fifth Amendment grand jury procedures.¹⁵⁷ The states are free to do away with the grand jury system and develop their

person can be called upon to defend himself on any charge prosecuted by information, he is entitled to a preliminary examination upon said charge, . . . held as to whether the crime for which it is sought to prosecute him has been committed, and whether there is sufficient cause to believe him guilty thereof.”), *superseded by statute on other grounds, as stated in* *People v. Rankin*, 337 P.2d 182, 191 (Cal. Ct. App. 1959).

152. CAL. CONST. art. I, § 14; *see also Gerstein*, 420 U.S. at 123 (noting that a finding of no probable cause in Alabama's preliminary hearing could mean the defendant would not be prosecuted).

153. *Whitman v. Super. Ct.*, 820 P.2d 262, 273 (Cal. 1991).

154. *See cases cited supra* note 144.

155. *Coleman v. Alabama*, 399 U.S. 1, 9 (1970).

156. *See Johnson v. Super. Ct.*, 539 P.2d 792, 799 (Cal. 1975) (Mosk, J., concurring). Justice Mosk explains that the development of preliminary examination as a “procedural outgrowth of the information” led to a movement to abolish the grand jury system in the 1920s and early 1930s. *Id.* at 799-800, 800 n.8.

157. *Hurtado v. California*, 110 U.S. 516, 535 (1884) (holding, if the grand jury system were intended to extend to the States, the express language used in the Fifth Amendment would have been included in the Fourteenth Amendment); *see also Beck v. Washington*, 369 U.S. 541, 545 (1962) (“Ever since *Hurtado v. California*, this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions.”).

own judicial proceedings, as long as the alternate proceedings provide due process.¹⁵⁸ In fact, the United States Supreme Court based this decision on California's preferred alternate proceeding—the preliminary examination.¹⁵⁹ The Court found California's preliminary examination satisfied due process requirements as an acceptable substitute for the indictment process *because* the criminal defendant had the right to counsel and cross-examination.¹⁶⁰ While the states are not required to provide any specific process,¹⁶¹ where they do, the process must adhere to federal due process standards.¹⁶² As a due process alternative to indictment by grand jury, the preliminary examination comes with constitutional rights,¹⁶³ including the fundamental right to confrontation.

E. Source of Confrontation Rights at Preliminary Examination

Despite its warning that “the Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done,”¹⁶⁴ the United States Supreme Court has not expressly extended Sixth Amendment Confrontation Clause application to preliminary examinations.¹⁶⁵ It is important to note, however, that the Court has never refused to do so. Whether full confrontation rights apply at preliminary examination is an open

158. *Hurtado*, 110 U.S. at 535.

159. *Id.* at 538.

160. *Id.*

161. *Id.* at 535.

162. *Hurtado*, 110 U.S. 516; *see, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103 (1975).

163. *See Coleman v. Alabama*, 399 U.S. 1 (1970) (explaining that a preliminary hearing is a critical stage requiring assistance of counsel).

164. *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)).

165. However, the United States Supreme Court has held that the Fourteenth Amendment makes Sixth Amendment confrontation rights obligatory to the States. *See Pointer v. Texas*, 380 U.S. 400, 414 (1965). The Court has also equated confrontation rights with the assistance of counsel rights. *In re Oliver*, 333 U.S. 257, 273 (1948) (finding basic rights in our system include, “as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel”). For an analysis equating the right to counsel with confrontation rights at preliminary examination, see Stoegbauer, *supra* note 79.

issue.¹⁶⁶ About the rights to confrontation and cross-examination, the Court has said, “they have ancient roots.¹⁶⁷ They find expression in the Sixth Amendment which provides that in all criminal cases¹⁶⁸ the accused shall enjoy the right ‘to be confronted with the witnesses against him.’ This Court has been zealous to protect these rights from erosion.”¹⁶⁹ Since the Court has not mandated one procedure the States must follow when initiating a criminal prosecution,¹⁷⁰ it would find difficulty creating a bright-line rule as to when Sixth Amendment confrontation rights must apply pre-trial. However, the Court has previously held that, outside the trial itself, confrontation rights exist through Fourteenth Amendment due process.¹⁷¹ Confrontation rights at preliminary examination should be viewed under the same light.

IV. A DUE PROCESS SOLUTION: BALANCING INTERESTS

The rights to confrontation and cross-examination are “an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.”¹⁷² However, these rights are not absolute.¹⁷³ Other legitimate “competing interests”¹⁷⁴ may override the rights.¹⁷⁵ Denying a defendant confrontation “calls into question

166. The closest the Court came to answering this question was its examination of the *Gerstein* hearing, where it held that States may elect to experiment with what rights to provide during preliminary examinations of the decision to prosecute. *Gerstein v. Pugh*, 420 U.S. 103, 127 (1975).

167. Pretrial cross-examination has deep historical roots. Under the sixteenth century Marian committal statute, at least one case notes a prisoner’s opportunity to cross-examine during the Magistrate’s examination of the accusing witness. See Robert Kry, *Confrontation Under the Marian Statutes*, 72 BROOK. L. REV. 493, 519 (2007).

168. Not, “criminal trials.”

169. *Pointer v. Texas*, 380 U.S. 400, 404-05 (1965) (quoting *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959)).

170. *Hurtado v. California*, 110 U.S. 516 (1884).

171. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471 (1972) (holding that parolees have a due process right to confrontation at parole revocation hearings).

172. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

173. *Id.*

174. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980).

175. *Chambers*, 410 U.S. at 295 (citing *Mancusi v. Stubbs*, 408 U.S. 204 (1972)).

the ultimate 'integrity of the fact-finding process,'" and the competing interest must be analyzed closely.¹⁷⁶

Proposition 115 was concerned with an important interest: the rights and protection of crime victims and witnesses.¹⁷⁷ This section proposes applying a Fourteenth Amendment due process balancing test that considers both the defendant's interest in confrontation and the State's interest in protecting victims and witnesses of crimes. Applying this test to preliminary examination would allow police officers to offer hearsay testimony only when the government's interest in protecting a victim or witness outweighs the defendant's interest in confrontation. This would provide for a more fair process by increasing the reliability of testimony offered to support a probable cause finding.¹⁷⁸ The United States Supreme Court has mandated applying a similar test to parole revocation hearings.¹⁷⁹

A. A Due Process Right to Confrontation

The Fourteenth Amendment Due Process Clause provides States may not "deprive any person of life, liberty, or property without due process of law."¹⁸⁰ It extends protection from state infringement on

176. *Id.* (quoting *Berger v. California*, 393 U.S. 314 (1969)).

177. *See supra* Part II.

178. *See generally* *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (stating, "the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence . . . not that evidence be reliable, but that reliability be tested in a particular manner: by testing in the crucible of cross-examination").

179. *Morrissey v. Brewer*, 408 U.S. 471 (1972). "Parole is the conditional release of a prisoner who has already served part of his or her state prison sentence." *Prison Law Office v. Koenig*, 233 Cal. Rptr. 590, 594 (Cal. Ct. App. 1986). An individual who has been released on parole is considered a "constructive prisoner" serving the remainder of his or her sentence out of custody instead of in prison. *Id.* As such, a State may impose conditions the individual must adhere to while on parole. *Id.* at 595. The ultimate question at a parole revocation hearing is whether the parolee can continue to be rehabilitated outside of prison, or if he poses a risk to society and should be returned to confinement in prison. 59 AM. JUR. 2D *Pardon and Parole* § 127 (2014). Before 2012, parole revocation hearings in California were considered administrative and were conducted by the Board of Parole Hearings. *See Williams v. Super. Ct.*, 178 Cal. Rptr. 3d 685, 694-95 (Cal. Ct. App. 2014). Since 2012, the California Penal Code has been amended to confer parole jurisdiction for parole revocation hearings on trial courts. *Id.*

180. U.S. CONST. amend. XIV, § 1.

specific fundamental rights, including the Sixth Amendment right to effective assistance of counsel.¹⁸¹ The Fourteenth Amendment provides this protection by requiring procedural due process.¹⁸² Procedural due process guarantees that States cannot deprive individuals of constitutionally protected interests without a fair procedure.¹⁸³ The United States Supreme Court has said determining what process is due is a constitutional question to be addressed by the judiciary, not by the legislature.¹⁸⁴ The Court addressed this question in the context of parole revocation hearings in *Morrissey v. Brewer*,¹⁸⁵ holding that during parole revocation hearings, due process requires cross-examination as a minimum protection.¹⁸⁶

This section begins with an analysis of *Morrissey v. Brewer*, discusses how *Morrissey* has been applied to the admissibility of hearsay in the Ninth Circuit, and finally, demonstrates how a test inspired by *Morrissey* can be applied to the question of the admissibility of hearsay at preliminary examination, as permitted by Proposition 115.

B. Due Process Confrontation at Parole Revocation Hearings

In *Morrissey v. Brewer*, defendant Morrissey was arrested on a parole violation, resulting in subsequent revocation of parole and incarceration.¹⁸⁷ Morrissey filed a habeas petition, alleging he was deprived due process because his parole was revoked without a hearing.¹⁸⁸ In determining whether due process rights apply to parole revocations, the Court noted, “whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss.”¹⁸⁹ Further, the due process determination

181. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

182. See, e.g., *Zinermon v. Burch*, 494 U.S. 113 (1990).

183. *Id.* at 125.

184. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW § 7.4.2 (3d ed. 2006) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985)).

185. *Morrissey v. Brewer*, 408 U.S. 471 (1972).

186. *Id.* at 489.

187. *Id.* at 472-73.

188. *Id.* at 474.

189. *Id.* at 481 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring)). The Court further noted that the

depends on whether the nature of the individual's interest at issue is "one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."¹⁹⁰ Once this determination is made, the question remains *what* process is due.¹⁹¹

The Court held that the parole revocation decision is subject to the Fourteenth Amendment,¹⁹² even though parole revocation is not part of the criminal prosecution,¹⁹³ because the parolee has a great interest in retaining his liberty.¹⁹⁴ The Court notes that in addition to the parolee's interest in his own liberty, society also has an interest—"the chance of restoring him to normal and useful life."¹⁹⁵ Terminating the parolee's liberty is a 'grievous loss' and requires some process.¹⁹⁶ In determining what process is due, the Court considered the State's interest in revoking parole, acknowledging that the State has an interest in returning a parolee to prison when it finds he has failed to follow his parole conditions.¹⁹⁷ Despite this, the Court held that the State has no interest in revoking parole without procedural guarantees, to ensure parole revocation is not based on erroneous information.¹⁹⁸

The Court then examined the two stages of parole revocation: the preliminary hearing following arrest¹⁹⁹ and the formal revocation hearing.²⁰⁰ The purpose of the preliminary hearing is to determine whether reasonable grounds exist to believe the individual has

Court of Appeals "recognized that the traditional view of parole as a privilege rather than a vested right is no longer dispositive as to whether due process is applicable." *Id.* at 474.

190. *Id.* at 481 (citing *Fuentes v. Shevin*, 407 U.S. 67 (1972)).

191. *Morrissey*, 408 U.S. at 481.

192. *Id.* at 482.

193. *Id.* at 480. There is room for argument that more due process rights apply during the preliminary examination than at parole revocation since the preliminary examination probable cause determination *does* have a direct bearing on the criminal prosecution. Parole revocation hearings, on the other hand, occur post-trial and after sentencing on the original criminal charge.

194. *Id.* at 482.

195. *Id.* at 484.

196. *Id.* at 482.

197. *Morrissey*, 408 U.S. at 483.

198. *Id.* at 483-84.

199. The Court likens this hearing to a probable cause for arrest determination. *Id.* at 485.

200. *Id.* at 488.

violated parole conditions.²⁰¹ At this hearing, an independent officer makes a preliminary decision of whether there is probable cause to hold the parolee to answer to the parole board, who makes the final revocation decision.²⁰² To promote fairness, a neutral officer other than the parole officer reporting the violations makes this decision.²⁰³ Due process requires the parolee have notice of this hearing and be free to testify and present evidence on his own behalf.²⁰⁴ Lastly, the parolee may request the witnesses against him be made available for questioning in his presence.²⁰⁵ Thus, even at this informal preliminary hearing, parolees are afforded confrontation and cross-examination rights.

At the formal revocation hearing, the parolee has the opportunity to show he did not violate the conditions of his parole, or that the violation does not warrant revocation.²⁰⁶ The “minimum requirements of due process” at this stage include notice of the violations, disclosure of the evidence against the parolee, the opportunity to be heard and present evidence, the right to confrontation and cross-examination, a neutral hearing body, and a written statement describing the reasons for parole revocation.²⁰⁷ The right to confrontation and cross-examination exists “*unless the hearing officer specifically finds good cause for not allowing confrontation.*”²⁰⁸ The Court gives an example of good cause to restrain confrontation rights: an informant who would be at a risk of harm if his identity were revealed.²⁰⁹ The good cause requirement is rooted in the parolee’s interest in maintaining his liberty.²¹⁰

To determine whether admitting hearsay at the revocation hearing violates the parolee’s right to confrontation, “the court must weigh the [parolee’s] interest in his constitutionally guaranteed right to

201. *Id.* at 485.

202. *Id.* at 487.

203. *Morrissey*, 408 U.S. at 485-86.

204. *Id.* at 486-87.

205. *Id.* at 487.

206. *Id.* at 488.

207. *Id.* at 489.

208. *Id.* (emphasis added).

209. *Id.* at 487.

210. *See id.* at 482.

confrontation against the Government's good cause for denying it."²¹¹ The weight to be given the parolee's confrontation rights depends primarily on two factors: (1) the importance of the hearsay evidence to the court's determination, and (2) the nature of the facts the hearsay evidence is offered to prove.²¹²

1. *The Morrissey Test Applied to Hearsay at Probation Revocation Hearings*²¹³

The Ninth Circuit first applied the *Morrissey* test to hearsay offered by a probation officer at a revocation hearing in *United States v. Comito*.²¹⁴ At probationer Comito's revocation hearing, his probation officer offered statements made by Comito's ex-girlfriend, the victim of the fraud charges Comito faced.²¹⁵ Comito argued the hearsay testimony violated his due process right to confrontation.²¹⁶ The court conducted the *Morrissey* balancing test and found that the hearsay statements did in fact violate Comito's confrontation rights.²¹⁷

In applying the first factor, the probationer's interest in the right to confrontation, the court emphasized that the more significant the

211. *United States v. Comito*, 177 F.3d 1166, 1170 (9th Cir. 1999); see also *Morrissey*, 408 U.S. at 484. This will subsequently be referred to as "the *Morrissey* test."

212. *Comito*, 177 F.3d at 1171. Courts have also considered other factors, such as the potential consequence of its finding. See *id.* at 1170 n.7.

213. Though some differences exist between probation and parole, the United States Supreme Court has held due process rights apply equally at the requisite revocation hearings. *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (holding, "a probationer, like a parolee is entitled to a preliminary and final revocation hearing under the conditions specified in *Morrissey v. Brewer*."). California Penal Code section 1203.2 governs probation and parole revocation hearings in California. CAL. PENAL CODE § 1203.2 (West, Westlaw current with urgency legislation through Ch. 931 of 2014 Reg.Sess., Res. Ch. 1 of 2013-2014 2nd Ex.Sess., and all propositions on 2014 ballots). However, parole revocation did not fall within the scope of section 1203.2 until its amendment in 2012. *Williams v. Super. Ct.*, 178 Cal. Rptr. 3d 685, 694 (Cal. Ct. App. 2014). Since then, courts have struggled to settle on a process for probation and parole revocation; however, it remains clear that the due process standards set forth in *Morrissey* will continue to apply. See *id.* at 698.

214. *Comito*, 177 F.3d at 1166.

215. *Id.* at 1168-69.

216. *Id.* at 1169-70; see *Morrissey*, 408 U.S. at 471.

217. *Comito*, 177 F.3d at 1173.

evidence is to the court's ultimate finding, the more important it is that the probationer have an opportunity to test the reliability of the evidence on cross-examination.²¹⁸ The court found Comito's interest was significant because the testimony spoke to the central issue of the court's finding on the probation violation—whether Comito had the witness's permission to use her cards and checks.²¹⁹ Comito's interest in confrontation was further strengthened by the nature of the unsworn statements, which the court characterized as the "least reliable type of hearsay."²²⁰ The court contrasted these "unsworn verbal allegations" with business and public records, finding the statements unreliable because they were not made under oath or in any context that would give them credibility.²²¹ Under the second factor, the Government's good cause in denying confrontation, the court examined the Government's claim that the ex-girlfriend declarant feared Comito.²²² The court gave little weight to this claim because the Government did not offer any evidence to substantiate it.²²³ The court ultimately held the Government lacked good cause in failing to produce the witness, and its interest in not doing so did not outweigh Comito's substantial interest in confrontation.²²⁴

The Ninth Circuit again applied the *Morrissey* test to victim statements offered as hearsay in *United States v. Holden*.²²⁵ At Holden's revocation hearing, the Government offered the hearsay statements of two individuals, and on appeal, Holden argued the hearsay violated his due process right to confrontation.²²⁶ While the court did not delve into the nature of the statements, it held that the

218. *Id.* at 1171 (citing *United States v. Martin*, 984 F.2d 308, 310-11 (9th Cir. 1993)).

219. *Comito*, 177 F.3d at 1171.

220. *Id.*

221. *Id.*

222. *Id.* at 1172.

223. *Id.* The court also cited evidence to the contrary. Comito's defense counsel produced evidence that the ex-girlfriend witness visited and called Comito in jail nearly every day, and she previously expressed concerns that she would face legal trouble if she testified at the revocation hearing in a manner contrary to the story she told Comito's probation officer. *Id.*

224. *Comito*, 177 F.3d at 1172.

225. *United States v. Holden*, 473 Fed. App'x. 759 (9th Cir. 2012).

226. *Id.* at 760.

Government had good cause in not producing the two witnesses.²²⁷ The witnesses expressed fear of retaliation by Holden since the beginning of their involvement in the case, and both witnesses recanted their testimony as it became clearer to them they would be further involved in testifying against Holden.²²⁸ The court further found the witnesses' statements were sufficiently reliable because each statement was consistent with the other, and both statements were consistent with one of the witness's injuries.²²⁹ The court did not describe Holden's interest in confrontation, but his interest is presumably that of every releasee, as described in *Morrissey*.²³⁰

2. *Mathews v. Eldridge, Adding a Third Factor*

Morrissey provides two essential factors of the procedural due process analysis: the defendant's interest in his right to confrontation and the government's interest in denying confrontation.²³¹ Four years after *Morrissey*, the Supreme Court decided *Mathews v. Eldridge*,²³² providing the general framework used to determine what procedural protections due process requires. The factors provided by *Mathews* are: (1) the individual interest affected by the government action; (2) the risk that the procedure used will erroneously deprive the individual of that interest and the value of any additional procedural safeguards; and (3) the government's interest, including any burdens an additional procedural requirement would impose.²³³ As applied to the question at issue—the admissibility of hearsay at preliminary examination—*Mathews* adds one more factor to be considered in the due process analysis: the risk the defendant will be erroneously deprived of his right to confrontation.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (“subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life”).

231. *Id.* at 482-83.

232. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

233. *Id.* at 335.

C. Applying Morrissey and Mathews to Proposition 115 Hearsay at Preliminary Examination

The criminally accused share many of the same liberty interests as the criminally convicted.²³⁴ Clearly, the criminally accused retain an interest in freedom from prosecution based on erroneous information.²³⁵ Similarly, the State should have no interest in prosecuting individuals without an initial probable cause determination, including testing the reliability and veracity of witness testimony.²³⁶ States would face great expense if there were no opportunity to evaluate the merits of a prosecution before trial, or at least before initiating significant discovery processes. The criminally accused cannot be deprived of their liberty without due process, and inherent in due process protection is the right to confront witnesses and hearsay declarants.²³⁷

The pre-trial preliminary examination is analogous to the formal parole revocation hearing. At both, the defendant is entitled to present evidence, confront and cross-examine witnesses, and to be heard by a neutral individual.²³⁸ The Court has determined that due process mandates these rights at the parole revocation hearing.²³⁹ Courts have prohibited the Government from offering the accusatory statements of

234. *Cf.* *United States v. Gouveia*, 467 U.S. 180, 190 (1984) (liberty interests protected by speedy trial rights include minimizing lengthy incarceration before trial, reducing the restraint on individual liberty imposed while out on bail, and shortening the disruption of life caused by pending criminal charges).

235. *Cf. Morrissey*, 408 U.S. at 484 (describing the societal interest against parole revocation being based on erroneous information).

236. *Cf. id.* (“[T]here is no interest on the part of the State in revoking parole without any procedural guarantees at all.”).

237. *Id.* at 489; *see also* *Valdivia v. Schwarzenegger*, 623 F.3d 849, 852-53 (9th Cir. 2010) (explaining that the purpose and value of confrontation, “to ensure reliability of evidence,” is the same whether the right arises out of the Sixth or Fourteenth Amendment).

238. *See Morrissey*, 408 U.S. at 489; *see also* sources cited *supra* notes 25-27.

239. *Morrissey*, 408 U.S. at 489. The Court even held that confrontation rights applied at the informal preliminary hearing, where no final decision is made. *Id.* at 486-87.

accomplices,²⁴⁰ experts,²⁴¹ and crime victims²⁴² as hearsay at parole revocation hearings because the statements lack reliability. However, Proposition 115 and *Whitman* made this type of hearsay admissible at preliminary examination.²⁴³ Unlike the revocation hearing, preliminary examination is a stage in the criminal prosecution.²⁴⁴ Thus, criminal defendants should receive at least as much due process protection as the Court has afforded parolees, if not more.²⁴⁵

Principles from *Morrissey* and *Mathews* can be combined to develop a due process balancing test applicable to Proposition 115 hearsay testimony offered at preliminary examination. The three factors to be weighed are: (1) the defendant's interest in confronting hearsay declarants at preliminary examination, measured by the importance of the hearsay and nature of the facts it proves; (2) the risk that allowing unverified hearsay at preliminary examination will erroneously deprive the defendant of his liberty; and (3) the government's interest in denying confrontation at preliminary examination.

1. Defendant's Interest in Confrontation

The importance of face-to-face confrontation has long been recognized throughout the history of the United States.²⁴⁶ Because the

240. *United States v. Huckins*, 53 F.3d 276, 279 (9th Cir. 1995) (finding hearsay evidence consisting of unsworn statements made by accomplice was not sufficiently reliable).

241. *See United States v. Martin*, 984 F.2d 308, 309-10 (9th Cir. 1993).

242. *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999).

243. *See People v. Miranda*, 1 P.3d 73, 80 (Cal. 2000); *Hosek v. Super. Ct.*, 12 Cal. Rptr. 2d 650 (Cal. Ct. App. 1992); *supra* Part II.B-C.

244. *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970).

245. *See Valdivia v. Schwarzenegger*, 623 F.3d 849, 853 (9th Cir. 2010) ("criminal defendant has an even greater liberty interest" than parolee). It can be argued, alternatively, that because the parole revocation hearing is the final stage in the revocation process, greater due process protection should be afforded at that stage. However, the defendant is subject to a direct deprivation of liberty if he is bound over for trial at his preliminary examination.

246. "The primary objective of [confrontation] was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness's, but of compelling him to stand face to face with the jury in order that they

determination to be made at a preliminary examination in California is whether the defendant is held to answer to the charges at trial, he has a strong interest in confronting the witnesses against him, including having an opportunity to cross-examine witnesses under oath, while their memory is still fresh.²⁴⁷ A witness's testimony will always be more reliable the sooner it is given after an event,²⁴⁸ and this becomes of increasing concern as delays in court systems increase the length of time between arrest and trial.

The defendant also has a heightened interest in confrontation where the reliability and accuracy of the offered statements are called into question.²⁴⁹ Under the *Morrissey* test, the defendant's interest in confrontation will be measured by the nature of the hearsay statement and the nature of the facts it is offered to prove.²⁵⁰ While Proposition 115 seeks to protect victims and witnesses of crimes, their out of court statements should be admitted at preliminary examination under limited circumstances because "unsworn verbal allegations are the least reliable type of hearsay."²⁵¹ Further, the defendant has a strong interest in confronting these witnesses if their testimony plays an integral role in the probable cause determination, and the due process balancing test finds a heightened interest in hearsay statements that bears heavily on the court's finding.²⁵² Former Penal Code section 872(b) contemplated the importance of these witnesses' live testimony—allowing the prosecutor to admit hearsay at preliminary examination in the form of a written statement *unless* the witness was a victim to or an eyewitness of the crime.²⁵³

may look at him, and judge by his demeanor upon the stand the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

247. See generally *id.*

248. This principle is reflected, for example, in the hearsay exception for past recollection recorded. CAL. EVID. CODE § 1237 (West 2004). When a testifying witness has an insufficient present memory, section 1237 allows the witness to read a statement from a writing *if* it was made at a time when the witness's memory was fresh. *Id.*

249. *United States v. Comito*, 177 F.3d 1166, 1171 (9th Cir. 1999).

250. See *id.* at 1173.

251. *United States v. Hall*, 419 F.3d 980, 987 (9th Cir. 2005) (quoting *Comito*, 177 F.3d at 1171).

252. *Comito*, 177 F.3d at 1171.

253. CAL. PENAL CODE § 872(b) (1990).

2. *The Risk of Erroneous Deprivation of Liberty*

This factor weighs heavily in favor of the defendant because the court removes any means by which to test the veracity of witness statements admitted into evidence as hearsay without confrontation. For example, when a police officer is testifying on behalf of a hearsay declarant, the officer is unable to answer questions about the circumstances under which the declarant made the statement. The testifying officer may never have even spoken with the witness on whose behalf he is testifying. Especially important under this factor is eyewitness identification. Proposition 115 opens the door for scenarios in which a prosecutor offers an eyewitness's hearsay testimony through a police officer at a preliminary examination, only to have that eyewitness be unable to identify the defendant at trial. A defendant in this position is certainly deprived of his liberty erroneously, and the eyewitness's memory should be tested at the first opportunity—the preliminary examination.

This does not mean that an absolute bar against the hearsay statements of crime victims and witnesses should apply. There will certainly be instances, as in *Holden*, where the government's interest outweighs the defendant's interest. If the magistrate is satisfied that the officer's recital of a witness's statement is sufficiently reliable, or the Government provides good cause as to why the witness cannot be produced, the defendant's confrontation rights may be outweighed.

3. *Government's Good Cause in Denying Confrontation*

Though the text of Proposition 115 explains its general purpose is to offer protection to victims and witnesses,²⁵⁴ it does not explain from what it intended to protect these individuals. Possibilities include the stress of testifying in court, potential for harassment by the defendant or other witnesses, and general safety.²⁵⁵ As another goal, Proposition 115 declared an interest in creating a "system in which justice is swift and fair."²⁵⁶ While there is an interest in protecting witnesses from the emotional and stressful process of giving

254. Proposition 115, *supra* note 1, § 5.

255. *Whitman v. Super. Ct.*, 820 P.2d 262, 277 (Cal. 1991) (Kennard, J., concurring and dissenting).

256. *See* Proposition 115, *supra* note 1, § 1(c).

testimony in open court, this must be balanced against the fact that the defendant's liberty is at stake. The lessened standard of proof at preliminary examination²⁵⁷ should ensure that witnesses are not dragged through lengthy cross-examination.²⁵⁸ Further, the prosecutor need only call a minimum number of witnesses to meet the decreased burden of proof at the preliminary examination.²⁵⁹

Finally, it is important to revisit the fact that the prosecutor has sole discretion to choose whether to prosecute by indictment or by information.²⁶⁰ The Federal Constitution requires one or the other, but it leaves the decision up to the State.²⁶¹ Where the Government chooses to prosecute by information, it puts the defendant's fundamental interests on the table to be considered at preliminary examination.²⁶² Conversely, if the Government prefers or needs to rely heavily on hearsay in a certain case, whether to protect witnesses or because they are difficult to procure, it has the sole discretion of deciding to proceed by indictment.²⁶³ This discretion should provide

257. CAL. PENAL CODE § 872. *See also* *People v. Powers-Monachello*, 116 Cal. Rptr. 3d 899, 918 (Cal. Ct. App. 2010) (the standard of proof at preliminary examination is whether there is sufficient cause to believe the defendant is guilty). This is a decreased standard from the beyond a reasonable doubt standard applicable at trial. *See generally* *People v. Aranda*, 283 P.3d 632, 642 (Cal. 2012) (at trial, due process requires the prosecution to prove a defendant's guilt beyond a reasonable doubt).

258. As well as the California Penal Code's mandate that preliminary hearing not be used as a discovery device. CAL. PENAL CODE § 866(b) (West 2014).

259. *See generally* *Mills v. Super. Ct.*, 728 P.2d 211, 216 (Cal. 1986) (noting corroborative evidence that would "bolster a showing of guilt beyond a reasonable doubt [at trial] will generally be unnecessary to establish sufficient cause").

260. *Hawkins v. Super. Ct.*, 586 P.2d 916, 921 (Cal. 1978) (the prosecutor has "completely unfettered discretion" in choosing to prosecute by indictment or information).

261. *Hurtado v. California*, 110 U.S. 516, 535 (1884); *see supra* Part III.D.

262. *Hawkins*, 586 P.2d at 917 ("The defendant accused by information immediately becomes entitled to an impressive array of procedural rights.").

263. It is not to say that indictment is preferred over prosecution by information. Many argue that the grand jury process denies due process of law and should be abolished. *Johnson v. Super. Ct.*, 539 P.2d 792, 797 (Cal. 1975) (Mosk, J., concurring); *see generally* Richard P. Alexander & Sheldon Portman, *Grand Jury Indictment Versus Prosecution by Information—An Equal Protection-Due Process Issue*, 25 HASTINGS L.J. 997 (1974).

few instances where a prosecutor has good cause to refuse to produce a witness for confrontation at preliminary examination.

V. HOW PROPOSITION 115 MAY NEGATIVELY AFFECT FORMER TESTIMONY RULES

In addition to its effect on confrontation rights, Proposition 115 may have detrimental effects on former testimony rules. While this comment does not expressly focus on this issue, this section briefly contemplates the negative effect Proposition 115 may have.

Evidence Code section 1291 provides that an unavailable witness's former testimony is admissible at a subsequent proceeding if the opposing party had the right and opportunity to cross-examine the declarant, and had an interest and motive similar to that at the current hearing.²⁶⁴ California courts have routinely admitted preliminary examination testimony at trial under this rule.²⁶⁵ However, the California Supreme Court has held that Proposition 115 is more like a *Gerstein* hearing, and therefore comes with no right to confrontation.²⁶⁶ If that is true, the practice of admitting former testimony under the Evidence Code based on a "right" to cross-examine is squarely contradictory. The test for former testimony and confrontation is whether the previous opportunity for cross-examination was effective.²⁶⁷ When the purpose of the hearing is merely to find probable cause,²⁶⁸ cross-examination is limited, and the

264. CAL. EVID. CODE § 1291 (West 1995).

265. See *People v. Gonzales*, 32 Cal. Rptr. 3d 172 (Cal. Ct. App. 2005); *People v. Liddicoat*, 174 Cal. Rptr. 649 (Cal. Ct. App. 1981); *People v. Hernandez*, 69 Cal. Rptr. 448 (Cal. Ct. App. 1968).

266. *Whitman v. Super. Ct.*, 820 P.2d 262, 272 (Cal. 1991).

267. *People v. Jones*, 78 Cal. Rptr. 2d 265, 268 (Cal. Ct. App. 1998).

268. CAL. PENAL CODE § 872 (West 2008); see also *Cash v. Super. Ct.*, 110 Cal. Rptr. 612, 615 (Cal. Ct. App. 1973) (citing *People v. Uhlemann*, 511 P.2d 609, 610 (Cal. 1973) ("A preliminary [examination] before a Magistrate is not a trial in the sense that an adjudication is made as to the guilt or innocence of the defendant; it is a pretrial hearing to establish probable cause . . .")).

examination cannot be used for purposes of discovery,²⁶⁹ it can hardly be said the defendant had a similar motive for cross-examination.²⁷⁰

CONCLUSION

Proposition 115 deprives criminal defendants of the fundamental right to confront and cross-examine adverse witnesses at preliminary examination. While the California Supreme Court has declined to hold the Sixth Amendment Confrontation Clause applies at preliminary examination, criminal defendants certainly have a due process right to confrontation at this hearing. A three-part balancing test rooted in Fourteenth Amendment procedural due process allows for a fair balance between public interest in effective prosecution and victim protection and the constitutional rights of the criminally accused. Applying a balancing test derived from that used in parole revocation hearings to preliminary examinations would provide a more fair, reliable, and effective process for criminal defendants.

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269. CAL. PENAL CODE § 866(b) (West 2008).

270. *See* United States v. Duenas, 691 F.3d 1070 (9th Cir. 2012) (former testimony from suppression hearing was inadmissible at trial because the defendant did not have a similar motive for cross-examination).

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