No._____

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS M. HA,

Petitioner,

v.

CHRISTINE POPOFF, Superintendent,
Oregon State Correctional Institution,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the holding in *Morrissey v. Brewer*, 408 U.S. 471 (1972), that a parolee's due process right to confront and cross-examine an adverse witness must be triggered by a request, is limited to preliminary hearings or, instead, extends to revocation hearings.

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The United States District Court for the District of Oregon denied Mr. Ha's petition for writ of habeas corpus in an unpublished opinion and order. Appendix at 15 ("Opinion and Order") (*Ha v. Popoff*, 2019 WL 6534115 (D. Or. 12/03/2019)). That Court also denied a Certificate of Appealability. *Id. and id.* at 20 (Judgment). Mr. Ha filed with the United States Court of Appeals for the Ninth Circuit a motion for a certificate of appealability, but the Court denied it. Appendix at 2 (motion) and 1 (*Ha v. Popoff*, __ F.3d __, No. 19-36112 (9th Cir. 08/06/2020) (Order)).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this petition for writ of certiorari under 28 U.S.C. § 1254(1) (2012). The Ninth Circuit filed the order sought to be reviewed on August 6, 2020. Appendix at 1.

STATUTORY PROVISIONS

28 U.S.C. § 2253(c)(1) (2012) provides:

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .

28 U.S.C. § 2253(c)(2) (2012) provides:

> A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. State Court Proceedings

In 1989, petitioner was convicted of three offenses and sentenced to two indeterminate 20-year terms and one 10-year indeterminate term, the terms to be served consecutively. The crimes were committed on May 21, 1989. On February 9, 2012, following a vehicular accident in Lincoln City, Oregon, parole revocation proceedings were initiated against Mr. Ha, based on allegations he had violated his parole conditions by failing to obey all laws, using controlled substances, and possessing a firearm.

On April 16, 2012, petitioner appeared, with counsel, for a *Morrissey* hearing.[1] The hearing officer admitted hearsay evidence, including but not limited to:

- Lincoln City Police Sergeant Brian Eskridge testified that another officer told him that a firearm had been located in the vehicle.
- Sergeant Eskridge's report corroborated his testimony that another officer told him that a firearm had been located in the vehicle.

[1] *Morrissey v. Brewer*, 408 U.S. 471 (1972).

- Officer Brett Rudolph's police report included a statement of a witness at the scene.

Based upon the findings and recommendations prepared by the hearing officer, the Oregon Board of Parole and Post-Prison Supervision (hereinafter "the Board"), found substantial evidence that petitioner had violated parole conditions, specifically "that [he] had used illegal controlled substances, had failed to obey all laws (based on evidence that he had driven recklessly and had failed to perform the duties of a driver), and had possessed a firearm." *Ha v. Board of Parole and Post-Prison Supervision*, 386 P.3d 70, 71 (Or. Ct. App. 2016). Based on these findings, on May 30, 2012, the Board revoked Mr. Ha's parole.

Mr. Ha filed an administrative review request on July 18, 2012, challenging the Board's reliance on hearsay. On April 23, 2013, the Board issued Review Response Number 5, and affirmed its Order of Revocation. On May 29, 2013 petitioner filed a timely petition for review in the Oregon Court of Appeals. The parties filed their respective briefs. On April 29, 2015, the Oregon Court of Appeals affirmed the Board's action without issuing a written opinion. *Thomas M. Ha v. Board of Parole and Post-Prison Supervision*, 352 P.3d 105 (Or. Ct. App. 2015) (A154373). On July 30, 2015, the Oregon Supreme Court denied Mr. Ha's petition seeking review. *Thomas M. Ha v. Board of Parole and Post-Prison Supervision*, 358 P.3d 1001 (Or. 2015).

B. Federal Habeas Proceedings

On March 30, 2017, Mr. Ha timely filed his Petition for Writ of Habeas Corpus. D.Ct. Dkt. 1. Mr. Ha claimed that the Board violated his right to due process by revoking his parole based, in material part, on hearsay without the hearing officer first "specifically find[ing] good cause for not allowing confrontation." D.Ct. Dkt. 41 at 2 (Supporting Brief) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). The hearsay evidence which the Board relied on in revoking Mr. Ha's parole included:

- Lincoln City Police Sergeant Brian Eskridge's testimony that another officer told him that a firearm had been located in the vehicle.

- Sergeant Eskridge's report corroborated his testimony that another officer told him that a firearm had been located in the vehicle.

- Officer Brett Rudolph's police report included a statement of a witness (Linda Moore).

The District Court rejected Mr. Ha's claim for several reasons. First, respecting all these hearsay statements, the court below determined that while the right to confrontation under *Morrissey* may be violated only if the parolee "request[s] . . . that [a] person who has given adverse information on which parole

revocation is to be based is to be made available for questioning in his presence," Mr. Ha did not make that request. Opinion and Order at 7-9. Second, the district court determined that Mr. Ha (1) "did not request that [Officer Rudolph] appear at the revocation hearing, and . . . did not object to his absence," (2) did not object "when Officer Eskridge testified about the gun and how he learned it was discovered in petitioner's rental vehicle[,]" and (3) "did not object to Ms. Moore's absence at the hearing." Opinion and Order at 8-9. Third, respecting the hearsay statement attributed to Officer Rudolph, the district court determined that whether or not the objection properly preserved the issue, "the record is clear that petitioner did not demand to confront or question Officer Rudolph." Opinion and Order at 8.

On February 3, 2020, Mr. Ha filed his Motion for Certificate of Appealability with the Ninth Circuit Court of Appeals. Mr. Ha argued that it is at least debatable whether the District Court's understanding of *Morrissey* is correct. While the Court quoted *Morrissey*, it selected language which described the "'preliminary hearing' . . . determin[ation] whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." *Id.* at 485. The proceeding at issue, however, was a revocation hearing, which "must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant

revocation." *Id.* at 488. With those higher stakes come greater procedural protections. The "minimum requirements of due process" at a revocation hearing "include . . . (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)[.]" *Id*. at 489. This revocation-hearing specific language from *Morrissey* makes it at least debatable whether a hearing officer's duty to determine whether good cause exists is only triggered by a parolee's request to confront and cross-examine adverse witnesses. *See, e.g., White v. White*, 925 F.2d 287, 291-92 (9th Cir. 1989) (finding that *Morrissey*'s confrontation requirement violated where hearing officer does not find "good cause for disallowing confrontation" and parolee does not knowingly and voluntarily waive his right to confront and cross-examine adverse witnesses).

Mr. Ha also argued in his request for a Certificate of Appealability that the District Court's conclusion that Mr. Ha had not invoked his right to confront and cross-examine was at least debatable. When Mr. Ha's attorney tried to object (to a question calling for speculation), the hearing officer cut him off and explained, "You need to remember this isn't court[,] so you'll – you can bring that up when it's your turn." D.Ct. Dkt. 24-3 at 119 (Respondent's Exhibits, Resp. Ex. 134 at 141). Mr. Ha argued in district court that even if he had to request that adverse witnesses be questioned in his presence, his objection to the hearsay at his earliest

opportunity to be heard, i.e., at the beginning of the defense case, invoked his right to confrontation. The court rejected this argument, deeming the objection late. Opinion and Order at *4 n. 2. However, the district court determination that it was too late is at least debatable, as there can be no serious question that the hearing officer would have treated an earlier objection in precisely the same way. Further, even if the request or objections were too late, the hearing officer addressed it by offering to try to make Officer Rudolph telephonically available for questioning. D.Ct. Dkt. 24-3 at 143 (Respondent's Exhibits, Resp. Ex. 134 at 165). Consequently, the objection, even if technically late, preserved the issue.

Finally, Mr. Ha argued in his request for a Certificate of Appealability that it is at least debatable whether Mr. Ha's objection to the hearsay evidence was itself a request to confront adverse witnesses.

On August 6, 2020, the Ninth Circuit denied a Certificate of Appealability.

REASON FOR GRANTING THE WRIT

I.

The Courts Of Appeal Are Split On Whether *Morrissey v. Brewer* Means What It Says: That A Parolee's Due Process Right To Confront And Cross-Examine Revocation Hearing Adverse Witnesses Is Not Be Triggered By A Request To Confront and Cross-Examine.

In *Morrissey v. Brewer*, 408 U.S. 471 (1973), this Court distinguished the due process right to which a parolee is entitled at a preliminary hearing from those to which he is entitled drew a critical distinction between the due process rights to which a parolee is entitled at preliminary hearings and those to which he is entitled accorded at revocation hearings. Whereas the preliminary hearing is conducted to determine whether "there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions," exists for revocation of parole[,]" the revocation hearing is held to determine "the final decision on revocation by the parole authority." *Id.* at 485, 488. The revocation hearing, the Court noted, "must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation." *Id.* at 488. With those higher stakes come greater procedural protections. Thus, at the preliminary hearing the parolee has a right to have adverse witnesses "be made available for questioning in his presence" but only

"[o]n request of the parolee[.]" *Id.* at 487. However, consistent with the higher stakes at a revocation hearing, *Morrissey* did not condition "the right to confront and cross-examine adverse witnesses" on the parolee's request.[2] *Id.* at 489. Instead, a parolee is entitled to this "the minimum requirement[] of due process" unless "the hearing officer specifically finds good cause for not allowing confrontation." *Id.* Thus, unlike at a preliminary hearing, at a revocation hearing the due process requirement that adverse witnesses be made available for questioning in the parolee's presence is not conditioned on a request from the parolee.

Despite this Court's conditioning the due process right to confront and cross-examine adverse witnesses on the a request from the parolee at a preliminary but not at a revocation hearing, the lower courts are split on whether *Morrissey* requires confrontation and cross-examination at either kind of hearing absent a request from the parolee. *Compare, e.g., Gholston v. Jones*, 848 F.2d 1156, 1160-61 (11th Cir. 1988) (parole revocation hearing constitutionally deficient where parolee did not confront adverse witnesses and, among other things, the record is silent as to whether the revocation hearing parolee was informed of his right to

[2] The right to confront a witness "includes not only a personal examination, but also . . . permits the [fact finder] to observe the demeanor of the witness in making his statements, thus aiding [the fact finder] in assessing his credibility." *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (internal quotations and citations omitted).

confront adverse witnesses) and *Wilkins v. Timmerman-Cooper*, 512 F.3d 768, 775-76 (6th Cir. 2008) (the *Morrissey* requirement that the parolee request the opportunity to confront and cross-examine adverse witnesses applies only to preliminary hearings, not revocation hearings) *with McBride v. Johnson*, 118 F.3d 432, 438 (5th Cir. 1997) (determining that that revocation parolee adequately invoked his right to cross-examine adverse witness) and *United States v. Pratt*, 52 F.3d 671, 677 n.4 7th Cir. 1995) (generally, the parolee must make "an initial request . . . to cross-examine the adverse witnesses" before a court determines whether good cause for not allowing confrontation exists).

For these reasons, the Ninth Circuit Court of Appeals should have issued a Certificate of Appealability because "reasonable jurists would find the district court's assessment of the constitutional claims debatable *or* wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Importantly, whether the district court's assessment was debatable or wrong "is not coextensive with a merits analysis." *Buck v. Davis*, 137 S.Ct. 759, 773 (2016). Indeed, a prisoner need not "show[] that the appeal will succeed, ... [only] something more than the absence of frivolity or the existence of mere good faith on his or her part[.]" *Miller-El v. Cockrell*, 537 U.S. 322, 337-38 (2003) (internal quotation marks and citation omitted). In Mr. Ha's case the Ninth Circuit should have issued a Certificate of Appealability because reasonable jurists could have debated whether it violated Mr. Ha's right to

due process to revoke his parole in reliance on material hearsay without first according him an opportunity to confront and cross-examine the declarant.

In Mr. Ha's case, the manner in which the district court resolved Mr. Ha's petition is not "beyond all debate." *Welch v. United States*, 136 S.Ct. 1257, 1264 (2016).

CONCLUSION

For these reasons, this Court should grant certiorari and remand to the Ninth Circuit with instructions to issue a Certificate of Appealability on whether the District Court should have granted equitable tolling and allowed Mr. Ha's habeas case to proceed.

Respectfully submitted on November 4th, 2020.

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