26-5965

ORIGINAL

Supreme Court, U.S.
FILED
SEP 29 2026
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

---

JUSTIN ROY SMITH,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF WASHINGTON,

DIVISION ONE

---

# PETITION FOR A WRIT OF CERTIORARI

---

JUSTIN ROY SMITH

Petitioner Pro Se

Stafford Creek Corrections Center

191 Constantine Way

Aberdeen, WA 98520

## QUESTION PRESENTED

In Morrissey v. Brewer, 408 U.S. 471, 489 (1972), this Court held that the minimum requirements of due process at revocation of conditional liberty include "disclosure to the parolee of evidence against him," stated without qualification, and "the right to confront and cross-examine adverse witnesses," deniable only where "the hearing officer specifically finds good cause for not allowing confrontation." The federal courts of appeals, and state courts of last resort including California's and Wisconsin's, hold the government to that structure: the evidence disclosed, and confrontation denied only for demonstrated cause. Washington instead permits officers' written or verbal summaries to stand in as the disclosure itself, and permits hearsay deemed "demonstrably reliable" on appeal to be received in place of live testimony. In this case, the substituted summaries described photographic evidence that the State's officers had collected, retained on a Department-issued phone, and, in its most probative part, deleted. The hearing court made no finding of good cause and undertook no good-cause analysis; the summaries were characterized as "demonstrably reliable" only on review.

The question presented is: Whether the minimum requirements of due process established in Morrissey, Id., for revocation of conditional liberty are met where the State proves violations through officers' summaries of evidence it collected and withheld, and where confrontation of the summaries' authors is denied without any specific finding of good cause by the hearing officer.

## PARTIES TO THE PROCEEDING

Petitioner is Justin Roy Smith, the defendant - appellant below. Respondent is the State of Washington, the plaintiff - respondent below.

## RELATED PROCEEDINGS

State v. Smith, No. 20-1-01315-31, Superior Court of Washington for Snohomish County. Judgment entered October 6, 2021; order revoking sentencing alternative and executing sentence entered March 4, 2024; order amending that order pursuant to the Court of Appeals' mandate entered July 31, 2026.

State v. Smith, No. 86394-1-I, Court of Appeals of Washington, Division One. Opinion affirming and remanding for correction of a clerical error, filed July 21, 2025; order denying reconsideration entered September 26, 2025; Mandate issued July 14, 2026.

State v. Smith, No. 104649-9, Supreme Court of Washington. Order denying review, filed July 1, 2026.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

SECTION | TABLE OF CONTENTS | PAGE


QUESTION PRESENTED ——— i

PARTIES TO THE PROCEEDING; RELATED PROCEEDINGS ——— ii

TABLE OF AUTHORITIES ——— v

INTRODUCTION ——— 1

OPINIONS BELOW ——— 2

JURISDICTION ——— 2

CONSTITUTIONAL PROVISION INVOLVED ——— 2

STATEMENT OF THE CASE ——— 3

└ A. The Suspended Sentence And Its Conditions ——— 3

└ B. The Search, The Photographs, And The Deletion ——— 4

└ C. The Demand For The Evidence And The Refusal ——— 5

└ D. The Revocation ——— 7

└ E. The Appeal ——— 8

REASONS FOR GRANTING THE PETITION ——— 9

└ I. The Decision Below Enforces A Rule That Conflicts With Morrissey And With The Decisions Of The Federal Courts Of Appeals And State Courts Of Last Resort ——— 9

└ A. Morrissey's minimum requirements formalize a principle older than Morrissey itself ——— 9

└ B. Every other court to address the question requires the government to justify itself; Washington requires no finding at all ——— 11

└ C. This case shows what the rule permits ——— 15

SECTION TABLE OF CONTENTS (Continued) PAGE


D. Flexibility operates above Morrissey's floor, not beneath it — 20

E. At a minimum, the disposition of this case is within the Court's summary powers — 21

II. The Question Presented Is Important And Recurring — 22

III. This Case Is An Ideal Vehicle — 23

CONCLUSION — 24

APPENDIX TABLE OF CONTENTS — App. i

Appendix A: Opinion of the Court of Appeals of Washington, Division One (July 21, 2025) — App. 1

Appendix B: Order of the Supreme Court of Washington Denying Review (July 1, 2026) — App. 33

Appendix C: Order Revoking Sentencing Alternative and Executing Sentence (Mar. 4, 2024), with Mandate of the Court of Appeals (July 14, 2026) and Order Amending (July 31, 2026) — App. 35

Appendix D: Order of the Court of Appeals of Washington Denying Motion for Reconsideration and Motion for Leave to Amend (Sept. 26, 2025) — App. 48

AUTHORITY

# TABLE OF AUTHORITIES

PAGES

## United States Supreme Court Cases


Arizona v. Youngblood, 488 U.S. 51 (1988) — 17

Black v. Romano, 471 U.S. 606 (1985) — 11, 20

California v. Trombetta, 467 U.S. 479 (1984) — 17

Cutter v. Wilkinson, 544 U.S. 709 (2005) — 18

Davis v. Washington, 547 U.S. 813 (2006) — 19

Douglas v. Buder, 412 U.S. 430 (1973) (per curiam) — 11, 21

Gagnon v. Scarpelli, ~~397~~ 411 U.S. 778 (1973) — 11

Goldberg v. Kelly, 397 U.S. 254 (1970) — 10

Greene v. McElroy, 360 U.S. 474 (1959) — 9-10, 16, 21

Mathews v. Eldridge, 424 U.S. 319 (1976) — 20-21

Morrissey v. Brewer, 408 U.S. 471 (1972) — passim

Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357 (1998) — 11

Riley v. California, 573 U.S. 373 (2014) — 22

United States v. Inadi, 475 U.S. 387 (1986) — 16, 19


## Second Circuit Court of Appeals Cases


United States v. Williams, 443 F.3d 35 (2d Cir. 2006) — 13


## Fourth Circuit Court of Appeals Cases


United States v. Doswell, 670 F.3d 526 (4th Cir. 2012) — 12

United States v. Wheeler, 130 F.4th 406 (4th Cir. 2025) — 12

AUTHORITY — TABLE OF AUTHORITIES (continued) — PAGES

Fifth Circuit Court of Appeals Cases

United States v. Grandlund, 71 F.3d 507 (5th Cir. 1995) ——— 12
United States v. Jimison, 825 F.3d 260 (5th Cir. 2016) ——— 12, 18
United States v. Minnitt, 617 F.3d 327 (5th Cir. 2010) ——— 12

Eighth Circuit Court of Appeals Cases

United States v. Sutton, 916 F.3d 1134 (8th Cir. 2019) ——— 13
United States v. Zentgraf, 20 F.3d 906 (8th Cir. 1994) ——— 13

Ninth Circuit Court of Appeals Cases

United States v. Comito, 177 F.3d 1166 (9th Cir. 1999) ——— 12, 20

Tenth Circuit Court of Appeals Cases

Curtis v. Chester, 626 F.3d 540 (10th Cir. 2010) ——— 13

Washington State Supreme Court Cases

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990) ——— 18
State v. Cardenas-Flores, 189 Wn.2d 243, 401 P.3d 19 (2017) ——— 18-19
State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999) ——— 8, 14, 15, 18, 23
State v. Nelson, 103 Wn.2d 760, 697 P.2d 579 (1985) ——— 8, 14, 23
State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) ——— 19

AUTHORITY — TABLE OF AUTHORITIES (continued) — PAGES


California Supreme Court Cases

People v. Arreola, 7 Cal. 4th 1144, 875 P.2d 736 (1994) — 13

Wisconsin Supreme Court Cases

State ex rel. Simpson v. Schwarz, 2002 WI App 7, 250 Wis. 2d 214, 640 N.W.2d 527 — 13-14

State ex rel. Wisconsin Department of Corrections, Division of Community Corrections v. Hayes, 2025 WI 35 — 14, 15

Constitutional Provisions

United States Constitution, Amendment XIV, § 1 — 2, 8

Statutes and Rules

28 U.S.C. § 1257(a) — 2

Federal Rule of Criminal Procedure 32.1(b)(2)(C) & advisory committee's notes to 2002 amendment — 11-12

Sup. Ct. R. 10 — 9

Sup. Ct. R. 13.1 — 2

Sup. Ct. R. 16.1 — 21

Washington Rule of Appellate Procedure 10.10(c) — 8

Washington Revised Code § 9.94A.670 — 3

AUTHORITY TABLE OF AUTHORITIES (continued) PAGES

Other Authorities

Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 311290, Probation and Parole in the United States, 2024 (2026) ——— 22

Council of State Gov'ts Justice Ctr., Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets (2019) ——— 22

## INTRODUCTION

This petition presents a question this Court answered in principle more than half a century ago and the lower courts have since divided over in practice: what must happen before a State may take away conditional liberty on the strength of evidence the accused is never shown, reported by witnesses he is never permitted to question. Morrissey v. Brewer promised every supervisee "an opportunity ... to show, if he can, that he did not violate the conditions" of his release. 408 U.S. 471, 488 (1972). Petitioner sought that opportunity. The State's officers had photographed the material underlying the alleged violations, kept the photographs on a Department-issued phone, and deleted the only images said to confirm the decisive fact, while the officers' own summaries of what they had seen contradicted one another on that same fact. The courts below nonetheless sustained the revocation by substitution: the officers' summaries were accepted as the disclosure that Morrissey promises without qualification, and the summaries' asserted reliability was accepted in place of the specific finding of good cause Morrissey requires of the hearing officer — a finding never made. Under the rule applied below, that sequence is no aberration; it is Washington's settled law. Only this Court can resolve whether it is consistent with Morrissey.

## OPINIONS BELOW

The opinion of the Court of Appeals of Washington, Division One (App. A) is published in part and reported at 34 Wn. App. 2d 925, 572 P.3d 469. The order of the Supreme Court of Washington denying review (App. B) is reported at 6 Wn.3d 1013, 591 P.3d 357. The order of the Superior Court for Snohomish County revoking petitioner's sentencing alternative and executing his sentence, and the order amending it (App. C), are unreported.

## JURISDICTION

The Court of Appeals of Washington issued its opinion on July 21, 2025, App. A, and denied reconsideration on September 26, 2025. App. D. Petitioner timely sought discretionary review, and the Supreme Court of Washington denied review on July 1, 2026. App. B. This petition is filed within 90 days of that denial. Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. §1257(a). Petitioner's federal due process claim was raised in, and passed upon by, the state courts. App. A, Op. 29-30; infra pp. 8-9, 23.

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, §1.

## STATEMENT OF THE CASE

(Citations to "CP" refer to the Clerk's Papers, and citations to "2RP" and "3RP" refer to the Verbatim Reports of Proceedings of the October 6, 2021 sentencing hearing and of the January 5 and March 4, 2024 revocation hearings - two consecutively paginated volumes - respectively, as those materials were designated in the record and briefing before the Court of Appeals of Washington. Citations to "Op." refer to the slip opinion of the Court of Appeals, reproduced at Appendix A.)

### A. The Suspended Sentence And Its Conditions

In 2021, petitioner pleaded guilty to first degree rape of a child, a class A felony. Op. 12. The Superior Court for Snohomish County imposed an indeterminate sentence of 108 months to life, and suspended it under Washington's Special Sex Offender Sentencing Alternative, RCW 9.94A.670 - a statutory disposition under which an eligible defendant serves a term of confinement, undergoes sex offender treatment, and lives under community supervision, subject to revocation and execution of the full sentence if conditions are violated. 2RP 18; App. C. The conditions of supervision, drafted by the State and entered as an appendix to the judgment, included restrictions on petitioner's communication with minors and his access to the internet and possession of computers, phones, and related devices. CP 64; 2RP 20. No such technology was used in the underlying offense of conviction.

B. The Search, The Photographs, And The Deletion

On December 12, 2023, four community corrections officers searched petitioner's residence and a Samsung smartphone found there. CP 107-108, 113. Officer Branham conducted the initial search of the phone, with Officer Chatman present. His sworn report states: "Photographs of all the violations were documented on my Department issued phone. The ages of the nude women were not determined during the time I was searching." CP 113. Officer Gill then took over the search from Officer Branham and examined the phone together with Officer Chatman, who remained throughout. Officer Chatman's report recounts, "CCO Gill and I took photos of this media as evidence for violations of SMITH's conditions of supervision," noting that "CCO Branham had previously taken pictures of the other material on the device." CP 115.

Within one messaging thread, the officers observed videos of a female and, later in the same thread, an image of a school report card. CP 108, 115. Officer Gill's report describes the person depicted as "appear[ing] to be between the age of 14-16" and treats the report card as confirmation of her minority. CP 108. Officer Chatman, who examined the same thread at the same time, swore to a different assessment - and to what he did next: "Upon realizing that the person depicted in the videos later in the chat was likely a minor, aged 16-17 years old, based on them being in the 11[th] grade, I deleted the photos that we had taken ... of the chat from CCO Branham's Department of Corrections-issued phone. CP 115.

The deletion was selective. Officer Gill's report reproduces the content of a different conversation from the same phone in narrative detail. CP 108, 111. The officers contemporaneous assessments of the decisive question - the ages of the persons depicted in the material they photographed - stood as follows:

- Officer Gill: the female "appeared to be between the age of 14-16;" her minority "confirmed" by the report card. CP 108; 3RP 46.
- Officer Chatman: "likely a minor, aged 16-17 years old." CP 115. The ages of females depicted elsewhere on the phone were "not readily apparent." CP 115.
- Officer Branham: "The ages of the nude women were not determined during the time I was searching." CP 113.

When the officers concluded, the Department's photographs of the other material remained on its phone; its photographs of the one item said to confirm any age did not.

## C. The Demand For The Evidence And The Refusal

The Department filed its notice of violation and the four officers' reports, CP 105-147, and the State petitioned to revoke on five alleged violations, CP 103-04. In written briefing, petitioner demanded disclosure of the evidence against him. CP 88-89. At the revocation hearing, counsel renewed the demand: "The State has not met the necessary disclosure requirements in order to preserve Mr. Smith's due process rights. The State argues that the violation reports from the CO's is

sufficient for disclosure under Morrissey. However ... [i]t cannot be said that the CO's conclusory and inconsistent statements amount to disclosure." 3RP 13. Counsel explained the defense use to which the withheld photographs would be put: "Had I been able to look at those photos, I would be able to potentially hire an expert to refute the claim that they were minors. So the age of those pictured is unsubstantiated and certainly not a verified fact." 3RP 14.

The State responded that "the violation reports which have been provided" supplied "written notice of the claimed violations," and represented: "The evidence that we have has been disclosed." 3RP 12. The prosecutor explained that they could not ask the police to expedite their forensic examination of the seized phone, which was serving a separate investigation, but acknowledged that a continuance would be appropriate if the court concluded disclosure was required. 3RP 12. Pressed later in the hearing, the prosecutor identified that examination as one means by which the phone's contents could be produced, and explained: "until the forensic download is complete, I cannot get my hands on it, and that is why I cannot turn that over to defense." 3RP 15-16.

No comparable explanation was offered - then or at any later point - for the photographs the Department's officers had taken and retained on the Department's own phone. The court ruled: "As of right now, as far as a discovery violation, the Court does not find that a discovery violation has occurred. They have been provided with the information that they are entitled to at this point." 3RP 19-20.

D. The Revocation

The hearing proceeded on the reports and a single witness. Officer Gill testified and was cross-examined; the court also considered the sworn reports of Officers Chatman, Branham, and Hollrah, and the report of the treatment provider, none of whom testified. App. C ¶¶ 1.2. The State made no showing - of unavailability, difficulty, expense, or otherwise - as to any absent author, and the court made no finding of good cause to proceed without them. 3RP 16-20, 76-80. On cross-examination, Officer Gill acknowledged that no officer had actually verified the report card's subject: "Q. [D]id you or any of your other CCOs check to confirm if she was an actual 11th grade student at the school referenced? A. No. We allowed Kent Police Department to do that investigation." 3RP 46. Confronted with Officer Chatman's statement that ages were "not readily apparent," he answered, "That may be to him"; confronted with Officer Branham's statement that ages were "not determined," he answered that Branham "may have searched different parts of the phone .... That's why his report would reflect a little bit different." 3RP 53-54.

In closing, the State rested on the report-card thread and Officer Gill's age assessments as establishing communications with minors. 3RP 57-60. The court found all five alleged violations as written, revoked the sentencing alternative, and ordered the 108-month-to-life sentence executed. App. C ¶¶ 2.1, 3.2.

E. The Appeal

In the Court of Appeals, petitioner raised, in a pro se statement of additional grounds - a filing Washington's rules permit without citation of authority, Wash. RAP 10.10(c) - the denial of disclosure of the evidence against him and of confrontation of the non-testifying officers, as a violation of the due process guaranteed by the Fourteenth Amendment under Morrissey. The Court of Appeals passed on the claim on the merits. Op. 29-30.

The Court of Appeals, Division One, affirmed in an opinion published in part. App. A. Applying the formulation announced in State v. Nelson, 103 Wn.2d 760, 697 P.2d 579 (1985), and reaffirmed in State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999) - under which "[g]ood cause is defined in terms of difficulty and expense of procuring witnesses in combination with demonstrably reliable ... evidence" - the court held: "Because this evidence was demonstrably reliable, Smith was not entitled to also confront and cross examine the other CCOs." Op. 29-30. As to disclosure, the court reasoned that the State could not provide a "completed report" of the smartphone's contents because the police forensic examination remained unfinished. Op. 30. The opinion did not address the photographs the Department's officers had created and retained. The court remanded solely for correction of a clerical error in one written finding, Op. 24, which the superior court entered on July 31, 2026, after the mandate issued on July 14, 2026. App. C. The federal question was then presented to the Supreme Court of Washington in the petition for

review below. That court denied review on July 1, 2026. App. B.

## REASONS FOR GRANTING THE PETITION

More than half a century after Morrissey v. Brewer, the courts remain divided over what its minimum requirements demand in practice. The decision below applies a published state rule under which officer's written summaries satisfy the disclosure Morrissey guarantees, and an after-the-fact reliability characterization replaces the good-cause finding Morrissey requires of the hearing officer. That rule conflicts with the decisions of the federal courts of appeals and of state courts of last resort, and it resolves an important question of federal due process in a way that conflicts with this Court's precedent. Sup. Ct. R. 10(b), (c).

### I. THE DECISION BELOW ENFORCES A RULE THAT CONFLICTS WITH MORRISSEY AND WITH THE DECISIONS OF THE FEDERAL COURTS OF APPEALS AND STATE COURTS OF LAST RESORT

#### A. Morrissey's minimum requirements formalize a principle older than Morrissey itself

The rights at issue did not originate in 1972. "Certain principles have remained relatively immutable in our jurisprudence," this Court explained in Greene v. McElroy, 360 U.S. 474, 496 (1959): "where governmental action seriously injures an individual, and the reasonableness of the action

depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." That is true "in the case of documentary evidence," and "even more important where the evidence consists of the testimony of individuals" whose accounts may be mistaken; for the latter, the law has "formalized these protections in the requirements of confrontation and cross-examination." Id. at 496-97. This Court carried the principle into modern due process doctrine in Goldberg v. Kelly, 397 U.S. 254, 269-70 (1970), and formalized it for revocations in Morrissey. Morrissey held that although revocation is not a criminal prosecution, the termination of a supervisee's liberty "inflicts a grievous loss on the parolee and often on others," 408 U.S. at 482, and that due process therefore imposes "minimum requirements":

> "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body ...; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole."

Id. at 489 (emphases added). The structure of the list matters. Disclosure is stated without qualification. Confrontation alone carries an

exception, and the exception has an assigned author: "the hearing officer," who must "specifically find[]" good cause. Ibid. Disclosure, the opportunity to present evidence, and confrontation - items (b), (c), and (d) - together secure the function Morrissey identified: the supervisee's "opportunity ... to show, if he can, that he did not violate the conditions," id. at 488. And the requirements as a whole exist to "give assurance that the finding of a parole violation is based on verified facts," id. at 484. Gagnon v. Scarpelli, 411 U.S. 778, 782, 786 (1973), extended these requirements to probation revocation, and Black v. Romano, 471 U.S. 606, 611-12 (1985), reaffirmed them. This Court has enforced them against state revocation practice, directly, including summarily. See Douglas v. Buder, 412 U.S. 430 (1973) (per curiam).

Petitioner does not contend that the Sixth Amendments' Confrontation Clause applies in full force at revocation, or that the exclusionary framework of a criminal trial does. See Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357 (1998). That is precisely the point. Because the trial's protections are withdrawn, Morrissey's minima are all that stand between a supervisee and revocation on unverified accusations. A rule that dissolves those minima leaves nothing.

B. Every other court to address the question requires the government to justify itself; Washington requires no finding at all

In the federal system, the inquiry Morrissey assigned to the hearing officer is now codified. Federal Rule of Criminal Procedure 32.1(b)(2)(C),

the codification, entitles a releasee to "question any adverse witness unless the court determines that the interest of justice does not require the witness to appear," and the advisory committee explained that "[t]he court is to balance the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it." Fed. R. Crim. P. 32.1 advisory committee note to 2002 amendment (citing Morrissey, 408 U.S. at 489).

The courts of appeals apply that inquiry as a constitutional matter. The Ninth Circuit holds that "every releasee is guaranteed the right to confront and cross-examine adverse witnesses at a revocation hearing, unless the government shows good cause for not producing the witnesses," and that the court "must weigh the releasee's interest in his constitutionally guaranteed right to confrontation against the Government's good cause for denying it." United States v. Comito, 177 F.3d 1166, 1170 (9th Cir. 1999). The Fifth Circuit vacated a revocation built on an officer's account of an absent declarant's statements where the district court "ma[de] no good cause determination at all." United States v. Jimison, 825 F.3d 260, 261-263 (5th Cir. 2016); see United States v. Minnitt, 617 F.3d 327, 332-33 (5th Cir. 2010); United States v. Grandlund, 71 F.3d 507, 510 (5th Cir. 1995). The Fourth Circuit expressly declined to retain a reliability-only test, holding that the rule "specifically requires" balancing "prior to admitting hearsay evidence in a revocation hearing." United States v. Doswell, 670 F.3d 526, 530-31 (4th Cir. 2012); see United States v. Wheeler, 130 F.4th 406, 417-19 (4th Cir. 2025). The Second and Eighth

Circuits require the same justification. United States v. Williams, 443 F.3d 35, 46 (2nd Cir. 2006); United States v. Sutton, 916 F.3d 1134, 1138-39 (8th Cir. 2019) (government must show both that confrontation is "undesirable or impractical" and that the evidence substituted is reliable); United States v. Zentgraf, 20 F.3d 906 (8th Cir. 1994). The Tenth Circuit permits the government to proceed on either balancing or a substantiated reliability showing - but even there, good cause is a governed, case-specific inquiry the government must satisfy before the hearing court, and "all circuits courts agree reliability is a very important factor" within that inquiry, not a dispensation from it. Curtis v. Chester, 626 F.3d 540, 546-47 (10th Cir. 2010).

State courts of last resort agree. California requires "the declarant's unavailability or other good cause" before even prior sworn in-court testimony - evidence categorically more reliable than an officer's investigative summary - may substitute for live examination, and holds that admission "without any showing of good cause" violates federal due process "as defined by" Morrissey. People v. Arreola, 7 Cal. 4th 1144, 1159-61, 875 P.2d 736 (1994). Wisconsin requires the hearing examiner to find good cause before hearsay may substitute for confrontation, under a balancing that weighs the probationer's need for cross-examination against the State's interest, "including consideration of the reliability of the evidence and the difficulty, expense, or other barriers to obtaining live testimony," - State ex rel. Simpson v. Schwarz, 2002 WI App 7, 20,

250 Wis. 2d 214, 640 N.W.2d 527 – and its high court, in 2025, sustained an administrator's refusal to revoke where the Department relied on hearsay without such a showing, holding that the administrator's "decision that good cause was not present was made according to law." State ex rel. Wisconsin Dep't of Corr., Div. of Comm. Corr. v. Hayes, 2025 WI 35, ¶37-39, 44.

Washington stands apart. Its rule – announced in State v. Nelson, 103 Wn.2d 760, 765, 697 P.2d 579 (1985), and reaffirmed in State v. Dahl, 139 Wn.2d 678, 686, 990 P.2d 396 (1999) – defines good cause "in terms of difficulty and expense of procuring witnesses in combination with demonstrably reliable ... evidence." Dahl itself applied that standard as a conjunctive one, reversing a revocation because the hearsay relied upon "appear[ed] to fail both prongs of the good cause standard: it was neither demonstrably reliable nor necessary, due to the difficulty in procuring live witnesses." 139 Wn.2d at 686-87, 990 P.2d at 401-02. As applied below, the conjunction fell away: no difficulty or expense was shown or found, no balancing was conducted, and the court of appeals affirmed on reliability alone. Op. 29-30. The operative distinction among these regimes is not the fine content of the test. It is that everywhere else, there is a test – a justification the government must carry before the hearing tribunal. Under the decision below, there is none.

The divergence is visible in the words themselves. Morrissey permits confrontation to be denied only where "the hearing officer specifically finds good cause." 408 U.S. at 489. Washington's controlling

formulation, as quoted below from Dahl, renders that parenthetical as "(unless there is good cause for not allowing confrontation)." Op. 29, (quoting Dahl, 139 Wn.2d at 683). The finding is gone, and so is the finder. Wisconsin's high court, by contrast, quotes the parenthetical as this Court wrote it. Hayes, 2025 WI 35, ¶31. Under Washington's phrasing, good cause need only exist – a condition a reviewing court may pronounce satisfied on a cold record, as the court of appeals did here, without any hearing officer having found, or analyzed, anything. Op. 30. The court of appeals did not reach the difficulty-and-expense element of Washington's own test at all, and the record contains no showing of it. Ibid.; 3RP 16-20, 76-80. The State's highest court, asked to review that application, declined. App. B. The formulation thus operates today precisely as it reads: Morrissey's requirement of a finding by the hearing officer has been replaced by a requirement that good cause be discernible to someone, somewhere, after the fact.

C. This case shows what the rule permits

1. Disclosure: Morrissey lists "disclosure to the parolee of evidence against him" without qualification. 408 U.S. at 489. What petitioner received instead was the officers' descriptions of the evidence – offered, in the State's words, as the disclosure itself: "The evidence that we have has been disclosed." 3RP 12. But summaries are not the evidence; they are a substitute for it, and "[w]hen two versions of the same evidence are available, longstanding principles of the law of hearsay

... favor the better evidence." United States v. Inadi, 475 U.S. 387, 394 (1986) (citation omitted).

The State possessed the better evidence twice over. One means of production was the forensic examination of the seized phone, which the State itself identified and acknowledged a continuance could accommodate. 3RP 12. The other required no continuance at all: the photographs the Department's own officers took of "all the violations" and retained on a Department-issued phone. CP 113, 115. If the first means was genuinely beyond reach, the second was in the supervising agency's hands throughout. The State used neither, and the courts required neither. The hearing court instead redefined the entitlement — petitioner had "been provided with the information that they are entitled to," 3RP 19-20 — and the court of appeals excused the nonproduction by reference to the unfinished police examination, Op. 30, an explanation that answers only the first means and never touches the second. No court in Washington addressed the Department's photographs at all.

The asymmetry this produced is the one Greene condemned. The State retained every advantage of the evidence — its lead officer described the material at length, and its closing argument invoked it, 3RP 57-60 — while bearing none of the burdens disclosure entails. Counsel's question at the hearing has never received an answer: if the State's witness could describe the material to the court, no reason appears why the defense could not examine it. 3RP 14-16. The defense use was concrete: with the photographs, counsel would have

been able to "hire an expert to refute the claim that they were minors," 3RP 14 - the decisive and contested fact.

Production, continuance, or forbearance from seeking revocation were all within the State's control; Morrissey's floor was not. And this record adds what even an ordinary nondisclosure case lacks: the State's officer deleted the photographs of the single item said to confirm any age, upon realizing its significance, while narrative reproductions of other material were preserved. CP 108, 111, 115. Even at a criminal trial, where the accused holds every other protection the Constitution affords, due process forbids the destruction of evidence whose exculpatory value was apparent before it was destroyed and for which no comparable substitute exists, California v. Trombetta, 467 U.S. 479, 489 (1984), and forbids the bad-faith destruction of evidence that is merely potentially useful, Arizona v. Youngblood, 488 U.S. 51, 58 (1988). Those trial-stage duties are conditional: they attach only where exculpatory value is apparent, or where defense has identified the evidence's utility; whereas Morrissey's disclosure right carries no such condition. It is narrower than a criminal trial's in reach - it reaches only that evidence offered to prove the alleged violations - but within that reach it is unqualified and mandatory: all "evidence against him," 408. U.S. at 489, without any showing by the supervisee of what it might reveal. And here that condition would be met in any event, because the defense identified the material's defensive use on the record before the hearing proceeded. 3RP 14. A right that requires no trigger should not mean less than one

that does, least of all where the supervisee holds almost nothing else. This is especially so where the withheld material was also the evidence the supervisee sought to present in his own defense, the guarantee Morrissey enumerated as Item (c). 408 U.S. at 489. What the State collected, it kept; what it kept, it withheld; and what mattered most, it deleted.

2. Confrontation. The revocation rested on four written accounts and one witness. App. C 91.2. As to the three officers and the treatment provider who never testified, the State proffered nothing – no unavailability, no difficulty, no expense – and the hearing court found nothing and analyzed nothing. 3RP 16-20, 76-80. Under every authority collected above, that alone required reversal. See Jimison, 825 F.3d at 263. The court of appeals supplied what the hearing court had not, characterizing the received evidence to be "demonstrably reliable" enough to deny confrontation and cross-examination. Op. 30. That substitution fails twice. It fails on the face of Washington's purported formulation, which pairs reliability with "difficulty and expense" – an element no one addressed. Dahl, 139 Wn.2d at 686. And it fails under Morrissey's text, which assigns the good-cause finding to "the hearing officer." 408 U.S. at 489. A reviewing court is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and Washington's own law commits credibility and persuasiveness determinations to the trier of fact, State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Cardenas-Flores, 189 Wn.2d

243, 266, 401 P.3d 19 (2017); State v. Thomas, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004). An appellate reliability characterization, rendered on a cold record, is not a hearing officer's specific finding; it is the absence of one, restated.

Nor could an honest inquiry have found good cause on this record, because the substituted accounts were not interchangeable with the testimony they replaced. Written statements procured by and from government officers "are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination." Davis v. Washington, 547 U.S. 813, 828 (2006) (quoting Inadi, 475 U.S. at 394). "If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version." Inadi, 475 U.S. at 394. Here the declarants were local officers of the supervising agency, and their accounts diverged from the testifying officer's on the dispositive question: the officer who conducted the initial search swore the ages of those depicted "were not determined"; the officer who observed the entire search swore they were "not readily apparent," and as to the one person he assessed, reached a different estimate than his colleague, resting on a document he then deleted. CP 113, 115; supra pp. 4-5. The single witness who did appear, when confronted with those divergences, could say of the officer who observed the entire search only "That may be to him," and of the officer who searched first only that he "may have searched different

parts of the phone," despite that officer swearing that he also searched the snapchat app. 3RP 53-54; CP 1. Both factors that matter under the consensus inquiry therefore cut decisively toward confrontation: the hearsay went to the ultimate, contested finding, and it was of the least reliable kind – untested observations on which the observers themselves disagreed. See Comito, 177 F.3d at 1171. The hearsay was not peripheral. The hearing court itself observed that under "normal circumstances" the cell phone violation "would not necessarily amount to being a revocation." 3RP 77. It is common-sense that whether the women petitioner allegedly communicated with were minors was the primary question on which revocation turned – and it was resolved on the say-so of absent declarants who contradicted the witness who appeared.

D. Flexibility operates above Morrissey's floor, not beneath it.

Morrissey itself described due process as "flexible," calling for "such procedural protections as the particular situation demands." 408 U.S. at 481.

Flexibility is real, but it has a direction. Morrissey denominated its list the "minimum requirements of due process" – the floor beneath which flexibility does not reach. Id. at 489; Black, 471 U.S. at 611-12. And where process is calibrated, it is calibrated to the weight of the interest at stake: "[w]hether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss," Morrissey, 408 U.S. at 481; see Mathews v. Eldridge,

424 U.S. 319, 335 (1976). The private interest here was as heavy as revocation ever presents: execution of an indeterminate sentence of 108 months to life. App. C.

Greene's principle has governed "not only in criminal cases ... but also in all types of cases where administrative and regulatory actions were under scrutiny," 360 U.S. at 496-97 – a fortiori it governs a proceeding that ends in prison. A doctrine of flexibility that produces less process as the stakes rise inverts the calculus this Court prescribed.

E. At a minimum, the disposition of this case is within the Court's summary powers

Plenary review is warranted to resolve the conflict described above and prevent the erosion of these minimum rights. But if the Court concludes that Morrissey itself already answers the question – that summaries are not disclosure and appellate characterization is not a hearing officer's finding – then the decision below is a candidate for summary disposition. Sup. Ct. R. 16.1. This Court has summarily reversed a state revocation that transgressed due process before. Douglas v. Buder, 412 U.S. 430, 432 (1973) (per curiam). Either course serves to vindicate the same floor.

## II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

At yearend 2024, an estimated 3,681,900 adults were under community supervision in the United States, each subject to revocation proceedings governed by Morrissey's minima. Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 311290, Probation and Parole in the United States, 2024, at 1 (2026). Revocation, not trial, is a principal pathway into American prisons: the most comprehensive fifty-state analysis found that 45 percent of state prison admissions result from supervision violations, and that in twenty states such violations account for more than half of all admissions. Council of State Gov'ts Justice Ctr., Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets 1 (2019).

For that population, the rule below is not an abstraction. It defines what a State's officers may do - summarize, withhold, and delete evidence - and what no tribunal need find, in proceedings where the deprivation may run, as here, to confinement for life. A regime answerable to no finding is a standing invitation to exactly what this record shows; a regime that must justify itself before the hearing officer is what every other jurisdiction already administers.

The question grows with its subject matter. Supervision increasingly turns on what officers find when they search a phone - "such a pervasive and insistent part of daily life," Riley v. California, 573 U.S. 373, 385 (2014) - and digital contents are precisely the evidence that can be photographed, described, withheld, or deleted at an

officer's election. And the question structurally evades review: Washington's rule is fixed in the published decisions of its highest court, Nelson, 103 Wn.2d at 765; Dahl, 139 Wn.2d at 686, while its applications issue in dispositions this Court rarely sees and the state's highest court, as here, declines to revisit. The conflict and erosion will persist in daily revocation practice until this Court resolves it.

## III. THIS CASE IS AN IDEAL VEHICLE

The question's disclosure component was pressed at the hearing, CP 88-89; 3RP 13-14; its confrontation component was raised on appeal; and the court of appeals adjudicated both on the merits, Op. 29-30, without invoking any procedural bar. Both were presented to the Supreme Court of Washington, which denied review. The question is outcome-determinative: it goes to the validity of the revocation itself. The judgment is final: the mandate issued on July 14, 2026, and the remand — limited to correction of a clerical error, Op. 24 — has been completed by the superior court's amending order of July 31, 2026. App. C. Nothing remains pending below. The operative facts are drawn from the State's own sworn reports and the transcripts, so no factual dispute obstructs review. Petitioner litigated the question below without counsel; the record it produced is nonetheless complete, and the question arrives here fully preserved. Relief would require only what Morrissey has required since 1972: a revocation hearing conducted with disclosure of the evidence and confrontation of adverse witnesses unless good

cause is specifically found by the hearing officer - nothing more.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JUSTIN ROY SMITH
Petitioner Pro Se
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Dated: September 29, 2026.