IN THE SUPREME COURT OF OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ALLEN DIMEN DELEON, Defendant and Appellant.	)	No. S230906 First District Court of Appeal No. A140050 Solano County No. FCR302185

Appeal from a Judgment of the Superior Court of
the County of Solano, State of California

Honorable Robert Bowers, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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Court of Appeal
Under the First District
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	)	No. FCR302185
Defendant and Appellant.	)	
	)	

APPELLANT'S OPENING BRIEF ON THE MERITS

STATEMENT OF THE ISSUE

In light of the changes made to the parole revocation process in the 2011 realignment legislation (Stats. 2011, ch. 15; 2012, ch. 43), is a parolee entitled to a probable cause hearing conducted according to the procedures outlined in *Morrissey v. Brewer* (1972) 408 U.S. 471 before parole can be revoked?

INTRODUCTION

On April 5, 2011, California Governor Edmund G. Brown signed into law AB 109, the "2011 Realignment Legislation Addressing Public Safety" ("Realignment"), which significantly altered the state's criminal justice system. These measures shifted responsibility for certain low-level offenders, parole violators, and parolees, previously the state's responsibility, to California counties. Starting October 1, 2011, three significant changes occurred: (1) felony offenders never convicted of a serious or violent crime or an aggravated white collar crime and not required to register as sex offenders will serve their sentences in local custody; (2) most offenders released from prison will be subject to local postrelease supervision rather that state parole; and (3) parolees who violate a condition of release will no longer be returned to prison, but will serve out their custodial punishment in county jail. In his signing message, Governor Brown proclaimed: "California's correctional system has to change, and this bill is a bold move in the right direction. For too long, the State's prison system has been a revolving door for lower-level offenders and parole violators who are released within months – often before they are even transferred out of a reception center. Cycling these offenders through state prisons wastes money, aggravates crowded conditions, thwarts rehabilitation, and impedes local law enforcement supervision." (Abarbanel et al., Realigning the Revolving Door: An Analysis of California Counties' AB 109 2011-2012 Implementation Plans (2013) Stanford Criminal Justice Center 1, 5.)

The legislation established, inter alia, a uniform process for revocation of probation, parole, and postrelease supervision of felons. (Sen. Bill No. 1023 (2011-2012 Reg. Sess.) § 2(a).) The Legislature intended this uniform procedure to comply with *Morrissey v. Brewer* (1972) 408 U.S. 472, which set forth the minimum due process requirements for parole revocation proceedings, including the requirement of a timely prerevocation probable cause hearing. (Sen. Bill No. 1023 (2011-2012 Reg. Sess.) § 2(b).) Under this uniform procedure, the courts have jurisdiction over petitions for revocation of supervision, including parole. (Pen. Code, § 1203.2, subds. (a), (b).) The uniform process became effective as to parolees on July 1, 2013. (Pen. Code, § 3000.08, subd. (m).)

Appellant maintains that, contrary to the holding of the Court of Appeal below, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a *Morrissey*-compliant probable cause hearing within 15 days of arrest on a charged parole violation. He contends that not requiring a *Morrissey*-compliant probable cause determination within 15 days denies him and other parolees the procedural protections to which he is entitled in revocation proceedings by both statute and established principles of procedural due process. As he was not provided with such a hearing, he requests dismissal of his sustained parole violation. In this regard, appellant asks this Court to follow the decision of Division Three of the Fourth District Court of Appeal in *Williams v. Superior Court* (2014) 230 Cal.App.4th 636, which held that "in parole revocation proceedings, a parolee is entitled to . . . a probable cause hearing within 15 days of the arrest." (*Id.* at 643.)

Whether due process requires a timely evidentiary preliminary probable cause hearing following revocation of parole must be analyzed under the requisites of the federal Constitution. Analysis under the due process clauses of the California Constitution is similar, and in this case would not lead to a different result. (See *People v. Ramirez* (1979) 25 Cal.3d 260, 269 [articulating this Court's four-part procedural due process test under the California Constitution].)

Appellant will analyze what process is due in four ways. First, the Legislature has resolved this procedural issue to reach the conclusion that due process requires a *Morrissey*-compliant probable cause hearing within 15 days of arrest on a charged parole violation. Second, a preliminary probable cause hearing is required by the relevant United States Supreme Court cases of *Morrissey v. Brewer, supra,* 408 U.S. 471 and *Gagnon v. Scarpelli* (1973) 411 U.S. 778. Third, this result is also derived from balancing the factors under the three-part federal constitutional test for determining procedural due process rights set forth in *Mathews v. Eldridge* (1976) 424 U.S. 319. Finally, other types of revocation proceedings which have been held not to require such a timely preliminary probable cause hearing are distinguishable from the parole context.

STATEMENT OF THE CASE

Appellant was arrested on August 23, 2013. (CT 5, 10; RT [9-11-13] 5; RT [9-25-13] 8.) On August 30, 2013, the Fairfield Parole Unit filed a petition to revoke appellant's parole. (CT 1; RT [9-25-13] 8.) On September 6, 2013, the Solano County Superior Court, ex parte, found probable cause to support a revocation, and preliminarily revoked supervision. (CT 1; RT [9-25-13] 9.) On September 11, 2013, when appellant was appointed counsel and brought to court for the first time, his attorney requested a dismissal on grounds that appellant's statutory due process rights had been violated. (CT 2, 5, 10; RT [9-11-13] 4-5.) In response, the prosecutor requested that a written motion be filed. (RT [9-11-13] 5.) Defense counsel requested an immediate remedy of discharging the petition. (RT [9-11-13] 5-6.) The judge asked for briefing, and continued the hearing. (RT [9-11-13] 7.) After briefs were filed, a hearing on the motion to dismiss was held on September 25, 2013, after which the court denied the motion to dismiss. (CT 16; RT [9-25-13] 4, 10.) On October 3, 2013, a contested hearing on the alleged parole violation was held. (CT 19-20; RT [10-3-13] 4.) The court found appellant in violation of parole, and sentenced him to 180 days in jail. (CT 19-20; RT [10-3-13] 35-37.)

Appellant filed a timely notice of appeal on October 8, 2013. (CT 21.) On appeal, he contended that his revocation must be reversed and vacated due to the superior court's failure to timely conduct a preliminary probable cause hearing. The Court of Appeal concluded that, under the parole revocation scheme embodied in Penal Code sections

1203.2 and 3000.08 as amended by the 2011 Realignment Act, superior courts are not required to conduct preliminary probable cause hearings as specified in *Morrissey v. Brewer, supra,* 408 U.S. 471, before revoking parole, and that a timely single hearing procedure can suffice. The Court of Appeal held appellant was afforded constitutionally adequate process, and affirmed the order finding him in violation of parole and sentencing him to 180 days in custody. Rehearing was denied on November 20, 2015, and review was granted on February 16, 2016.

STATEMENT OF FACTS[1]

On August 23, 2013, officers and agents of the SAFE Task Force, a sex offender task force run by the Sheriff's Office in conjunction with U.S. Marshals, Probation, and Parole, conducted a parole search of appellant's motel room in Vallejo. (RT [10-3-13] 26-28.) Two cell phones belonging to appellant were located. (RT [10-3-13] 28.) One of the phones contained the following: A video of a male masturbating in that motel room (RT [10-3-13] 29); and photographs of teenagers or young adults showing their genitals in sexually explicit positions (RT [10-3-13] 29, 35); adult women showing their breasts and vaginal areas (RT [10-3-13] 30); girls under 18 showing their breasts and vaginal areas (RT [10-3-13] 30-31); pre-pubescents in underwear (RT [10-3-13] 31, 36); and adults in various positions of fornication and/or nakedness (RT [10-3-13] 35.) The photographs were admitted into evidence. (RT [10-3-13] 32-33; People's Exhibits 1-8.)

The court found appellant to be in violation of parole conditions that prohibited him from possessing pornography and possessing material depicting children in undergarments. (SCT 1, 6, 24; RT [10-3-13] 35-36.)

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1 The factual summary is taken from the hearing on the parole violation held on October 3, 2013.

ARGUMENT

THE SUPERIOR COURT'S FAILURE TO HOLD A TIMELY PROBABLE CAUSE HEARING CONSISTENT WITH GOVERNING STATUTES AND ESTABLISHED PRINCIPLES OF PROCEDURAL DUE PROCESS REQUIRES DISMISSAL OF THE CHARGED PAROLE VIOLATION

A. Governing Parole Revocation Statutes Require A Preliminary Probable Cause Hearing

The requirement of a timely preliminary probable cause hearing would comply with the mandates of the California statutes which govern parole revocation.

Prior to realignment, the state's administrative parole revocation proceedings were operated pursuant to an injunction issued by a federal district court that required preliminary probable cause hearings within ten days of the parolee being given notice of the charges. After the enactment of realignment, the federal district court lifted the injunction and dismissed the case as moot. (*Valdivia v. Brown* (E.D. Cal. 2013) 956 F.Supp.2d 1125, 1126-1227.) In doing so, however, the federal court cautioned that "[w]hether the new system provides adequate due process must be demonstrated in practice without untoward judicial interference until the need for intervention is clear." (*Id.* at 1136-1137.) The court also warned that "a rever[sion] to a wholly internal review process for assessing probable cause" might represent a return to "the type [of probable cause determination] that this court found unconstitutional [in *Valdivia I*] in 2002. Nevertheless, for the reasons set forth above, any such infirmities will have to be addressed, if at all, in a subsequent lawsuit or lawsuits." (*Id.* at 1137.)

Previously, the Board of Parole Hearings conducted parole probable cause and revocation hearings. In 2012, as part of the realignment system, the Legislature amended Penal Code section 1203.2, which previously dealt solely with revocation of probation, to apply to the revocation of multiple forms of supervision (Pen. Code, § 1203.2, subds. (a), (f)(3)), thereby establishing a uniform process for revocation of parole, probation, and postrelease supervision of most felons. (3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2014 supp.) Punishment, § 687A, p. 121.) Consequently, under current section 1203.2, the court has authority to revoke the supervision of a person on grounds specified in the statute. (Pen. Code, § 1203.2, subds. (a), (b).)

The legislation was intended to promote uniform parole revocation procedures and "simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under *Morrissey v. Brewer* (1972) 408 U.S. 471, *People v. Vickers* (1972) 8 Cal.3d 451, and their progeny." (2011 Realignment Legislation, SB 1023, Sec. 2(b), effective June 27, 2012.)

Penal Code section 1203.2 governs the procedure for courts to use to adjudicate alleged parole violations. Penal Code section 3000.08, subdivision (c), allows for the arrest of a parolee with or without a warrant. Penal Code section 3000.08, subdivision (d), governs intermediate sanctions for parole violations, and states that after finding good cause that the parolee has violated a condition of parole, the parole board may add additional conditions of parole, including treatment and rehabilitation services, incentives, and "immediate, structured, and intermediate sanctions." Penal Code section 3000.08,

subdivision (f), requires the supervising parole agency to determine that intermediate sanctions are not appropriate before filing a formal petition to revoke parole.

With the filing of a petition to revoke parole, courts become involved with a parole violation. If the parole board determines that intermediate sanctions are not appropriate, the agency may file a petition with the courts pursuant to Penal Code section 1203.2 for revocation of parole. It is filed in the superior court where the parolee is being supervised. (Pen. Code, 3000.08, subd. (f).) "The petition shall include a written report that contains additional information regarding the petition, including the relevant terms and conditions of parole, the circumstances of the alleged underlying violation, the history and background of the parolee, and any recommendations." (Pen. Code, § 3000.08, subd. (f).)

Penal Code section 3044, subdivision (a)(1) provides: "A parolee shall be entitled to a probable cause hearing no later than 15 days following his or her arrest for violation of parole." Subdivision (a) further provides: "Notwithstanding any other law, the Board of Parole Hearings or its successor in interest shall be the state's parole authority and shall be responsible for protecting victims' rights in the parole process."

Commentators have noted it is unlikely that Penal Code section 3044 applies to the courts. (See *Williams v. Superior Court, supra,* 230 Cal.App.4th at 658.) Subdivision (b) of Penal Code section 3044 provides: "The board shall report to the Governor." Courts do not "report to the Governor." Courts are not the "state's parole authority" after July 1, 2013. It is doubtful the courts, in the judicial branch of government, can be a successor in interest to the Board of Parole Hearings, which is in the executive branch. Penal Code

section 3044 may at first seem inconsistent with the Legislature's intent to have all supervision revocation proceedings governed by Penal Code section 1203.2. Yet Penal Code section 3044 is still on the books. (*Williams v. Superior Court, supra.*)

Williams v. Superior Court, supra, 230 Cal.App.4th 630 provides a well-reasoned statutory analysis demonstrating that Penal Code section 3044's mandate of a probable cause hearing within 15 days of a parolee's arrest still applies. (*Williams v. Superior Court, supra,* at 657-659.) That statutory analysis was not considered by the Court of Appeal below in *DeLeon.* The analysis is set forth in the following three paragraphs.

Although Penal Code section 3044 might appear to be superseded by the realignment statutes, the implied repeal of a statute is disfavored. *(Crosby v. Patch* (1861) 18 Cal. 438, 441.) "A new statute is not construed as an 'implied repeal' unless it is clear that the later enactment is intended to supersede the existing law." *(California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217, 112.) Rather, the two must be construed together, and effect given, if possible, to both. *(Crosby, supra,* at 441.) Further, Penal Code section 3044 was enacted as a voter initiative, which, by its terms may "not be amended by the Legislature except by a statute passed in each house by roll-call vote entered in the journal, three-fourths of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters." (Voter Information Guide, Gen. Elec. (Nov. 4, 2008) text of Prop. 9, § 9, p. 132.) Penal Code section 1203.2 was passed in its current form as Senate Bill No. 76 in the California Senate by a vote of 30 senators (three-fourths of the senate membership of 40), and by the California

Assembly by a vote of 54 to 25 (a margin less than three-fourths of the assembly membership). These margins thus were less than the 75 percent concurrence in both houses as required by the terms of Proposition 9 for an implied amendment or repeal of Penal Code section 3044. (See also Cal. Const., art. II, § 10 subd. (c) [forbidding the Legislature from amending enactments made by voter intitiative if the amendments are inconsistent with that initiative].) (*Williams v. Superior Court, supra,* 230 Cal.App.4th at 658.)

While the courts may not be the "successor in interest" to the Board of Parole Hearings, those portions of Penal Code section 3044 intended to provide minimum standards of due process protection to parolees can be harmonized with section 1203.2. Prime among these minimum standards guaranteed by Penal Code section 3044 are the entitlements to a probable cause hearing within 15 days, and a revocation hearing within 45 days of an arrest for violation of parole. (*Williams v. Superior Court, supra,* 230 Cal.App.4th at 658-659.)

Thus, Penal Code section 3044, at least as to the right to a preliminary probable cause hearing within 15 days, still applies in post-realignment California to alleged parole violators.

B. Though Still In Constructive Custody, Parolees Retain Certain Basic Rights And Liberty Interests Protected By The Due Process Clause, Including The Right To A Preliminary Probable Cause Hearing As Set Forth In *Morrissey*

Even if this Court were to conclude that the governing parole revocation statutes do not mandate a preliminary probable cause hearing within 15 days, federal constitutional principles of procedural due process do.

The liberty interests of parolees are not the same as those of ordinary citizens. The United States Supreme Court has recognized that parolees enjoy fewer constitutional rights than do ordinary persons. (*Morrissey v. Brewer, supra,* 408 U.S. at 482.) This Court has likewise observed that "[t]he interest in parole supervision to ensure public safety, which justifies administrative parole revocation proceedings in lieu of criminal trial with the attendant protections accorded defendants by the Bill of Rights, also permits restrictions on parolees' liberty and privacy interests." (*People v. Burgener* (1986) 41 Cal.3d 505, 532, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 756.) "Parole is the conditional release of a prisoner who has already served part of his or her state prison sentence. Once released from confinement, a prisoner on parole is not free from legal restraint, but is constructively a prisoner in the legal custody of state prison authorities until officially discharged from parole." (*Prison Law Office v. Koenig* (1986) 186 Cal.App.3d 560, 566, citing *People v. Borja* (1980) 110 Cal.App.3d 378, 382; *People v. Burgener, supra,* at 531; Pen. Code, § 3056 [prisoners on parole remain under the supervision of the California Department of Corrections and Rehabilitation].)

On the other hand, although under the constructive custody and supervision of the parole authorities, parolees nevertheless retain certain basic rights and liberty interests while on parole. "[T]he liberty of a parolee . . . includes many of the core values of unqualified liberty," and his or her "condition is very different from that of confinement in a prison." (*Morrissey v. Brewer, supra,* 408 U.S. at 482; see also *People v. Burgener,* supra, 41 Cal.3d at 530.) As *Burgener,* quoting a commentator, observed, "'[I]n most cases the life of a parolee more nearly resembles that of an ordinary citizen than that of a prisoner. The parolee is not incarcerated; he is not subjected to a prison regimen, to the rigors of prison life and the unavoidable company of sociopaths . . . . The parolee lives among people who are free to come and go when and as they wish. Except for the conditions of parole, he is one of them.' (Note (1969) 22 Stan.L.Rev. 129, 133; see also White, The Fourth Amendment Rights of Parolees and Probationers (1969) 31 U.Pitt.LRev. 167, 177.)" (*People v. Burgener, supra,* at 530.)

Procedural due process grants a right to notice and a hearing whenever government action threatens an individual with a loss of liberty or property. (*Fuentes v. Shevin* (1972) 407 U.S. 67, 80.) In *Goldberg v. Kelly (*1970) 397 U.S. 254, the United States Supreme Court held that procedural due process required an evidentiary hearing prior to the termination of welfare benefits. In *Morrissey v. Brewer, supra,* 408 U.S. 471, applying the standard notice-and-hearing due process model, the high court concluded that when the government seeks to revoke a convicted defendant's parole, the defendant is constitutionally entitled to a preliminary probable cause hearing immediately following his

arrest to review the factual basis to justify recommitting him to prison, pending a final evidentiary hearing. *(Id.* at 485-488.)

In *Morrissey, supra,* 408 U.S. 471, two petitioners alleged they were denied due process when their paroles were revoked without a hearing based on the parole board's review of the parole officer's written reports. (*Id.* at 472-474.) The United States Supreme Court stated that a parolee is not entitled to the full panoply of due process rights, because parole revocation is not a part of a criminal prosecution and because revocation deprives a parolee of conditional liberty, not absolute liberty. (*Id.* at 480.) Nevertheless, *Morrissey* held that a parolee who has been detained for a parole violation is entitled to both an informal probable cause hearing and a final revocation hearing. (*Id.* at 485, 487.)

The purpose of the probable cause hearing is "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." (*Morrissey, supra,* 408 U.S. at 485.) This "minimal inquiry [must] be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available." (*Ibid.*) "The determination must be made by 'someone not directly involved in the case' (*ibid.*), who need not be a judicial officer." (*Id.* at 486-487.) "At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or" witnesses. (*Id.* at 487.) Generally, the parolee may question any "person who has given adverse information on which parole revocation is to be based . . . . " The hearing officer must prepare "a summary . . . of what occurs at the

hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position." (*Ibid.*) The "decision maker should state the reasons for his determination and indicate the evidence he relied on, but need not make 'formal findings of fact and conclusions of law.'" (*Ibid.*)

A final revocation hearing must take place within a reasonble time after the parolee is taken into custody. (*Morrissey, supra,* 408 U.S. at 487-488.) The parolee is entitled to written notice of the allegations, disclosure of adverse evidence; an opportunity to be heard in person, to present witnesses and documentary evidence, and generally to confront and cross-examine adverse witnesses; a "neutral and detached' hearing body"; and "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *(Id.* at 489.)

Morrissey emphasized that it sought not to "create an inflexible structure for parole revocation procedures" (*Morrissey, supra,* 408 U.S. at 490), but rather to enunciate the "minimum requirements of due process." (*Id.* at 489). It is well established that "due process is flexible and calls for such procedural protections as the particular situation demands." (*Id.* at 481.) The revocation decision involves two questions: Did the parolee actually violate a parole condition? And, if so, "should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?" *(Morrissey, supra,* 408 U.S. at 479-480.) The second question is discretionary, and entails a prediction of whether the individual is able "to live in society without committing antisocial acts." (*Id.* at 480, 484.)

As *Morrissey* noted, the liberty interest at stake in cases such as the present case is a parolee's interest in retaining the "enduring attachments of normal life" so long as he or she does not violate the conditions of parole." (*Morrissey, supra,* 408 U.S. at 482.) While there may be no constitutional right to parole, and while the conditions of parole may significantly restrict a parolee's freedom, it is self-evident that the liberty interest of a parolee is significant, and greater than the liberty interest of a prisoner still confined in the prison system. (*Ibid.*)

Under the reasoning of *Morrissey,* the "fairness and reliability" of the existing procedures should be measured by determining how effective the procedures are in assuring a factually accurate statement of (1) whether there is probable cause to believe that the parolee violated parole (procedures during preliminary stage); and (2) whether the parolee did in fact violate parole (procedures during revocation hearing). As the United States Supreme Court explained, "[i]n analyzing what [process] is due, we see two important stages in the typical process of parole revocation. . . The first stage occurs when the parolee is arrested and detained, usually at the direction of the parole officer. The second occurs when parole is formally revoked." (*Morrissey, supra,* 408 U.S. at 485.) The first stage is to ensure that the parolee's life is not disrupted by an unjustified parole hold, while the second stage requires reliable information justifying the parolee's long-term reincarceration. *(Ibid.)* Fundamentally, then, the process due must include procedures which will prevent parole from being revoked because of "erroneous information or because of an erroneous evaluation." (*Id.* at 484.)

In *Morrissey,* then, the United States Supreme Court determined that the Constitution requires a two stage process. (*Morrissey, supra,* 408 U.S. at 485.) Two issues – adequacy of evidence to detain and adequacy of evidence to revoke - must be addressed separately because they fulfill different purposes. The court explained that the initial inquiry should be seen as in the nature of a preliminary hearing 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. (*Ibid.*) At the preliminary hearing, the probable cause question must be asked, and answered affirmatively, before the parolee's living, working and treatment arrangements are interrupted for a significant time. At the revocation hearing, the ultimate factual finding is made, i.e., whether the offender violated parole. Thus, two separate purposes must be accomplished.

Further, *Morrissey's* explanation of the requirements for a preliminary procedure clearly suggests that it contemplated a "hearing," rather than an ex-parte process for confirming probable cause. In describing the preliminary hearing, the court stated that "the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation." (*Id.* at 486-487.) The court added, "At the hearing, the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer." (*Id.* at 487.) Moreover, on request of the parolee, the "person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence." *(Ibid.)* Finally, the court required that

he determination of reasonable grounds "should be made by someone not directly involved in the case." (*Id.* at 485.)

Therefore, in order to protect a parolee's liberty interest, *Morrissey* requires procedures to ensure not only that the state does not revoke parole without an adequate factual basis, but that parolees are not detained without some sort of assurance that there is probable cause to suspect a parole violation. The effect of detention itself, in its disruption of the parolee's family relationships, job, and life, is sufficiently significant to require such a procedure. In the present case, appellant was denied due process since, as a parolee, he was not afforded a preliminary probable cause hearing to verify the existence of probable cause prior to the revocation hearing.

That two hearings are required is shown by the United States Supreme Court's next discussion of this issue following *Morrissey.* A year later, the court explained that in *Morrissey,* it "held that a parolee is entitled to two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other a somewhat more comprehensive hearing prior to the making of the final revocation hearing." (*Gagnon v. Scarpelli, supra,* 411 U.S. 778, 781-782.) *Gagnon* further held that *"Morrissey* mandated preliminary and final revocation hearings." (*Gagnon, supra,* at 786.) The court in *Gagnon* again emphasized, "At the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations . . . an opportunity to appear and to present evidence on his own behalf, a conditional right to confront adverse witnesses, an independent

decisionmaker, and a written report of the hearing." *(Ibid.)* Finding no difference between parole and probation revocations, the court held that a probationer, like a parolee, is entitled to a preliminary and final revocation hearing. *(Id.* at 782.) It would thus appear that *Morrissey* and *Gagnon* are dispositive of the present question.

C. Under The Three-Part Procedural Due Process Balancing Test Set Forth In *Mathews v. Eldridge,* A Parolee Must Be Afforded A Prompt Preliminary Probable Cause Hearing

Even assuming that *Morrissey* and *Gagnon* do not compel a prompt preliminary probable cause hearing, this conclusion is necessitated by application of the three-step balancing test to resolve procedural due process claims adopted by the United States Supreme Court in *Mathews v. Eldridge* (1976) 424 U.S. 319. That test requires a court to consider three factors to determine the measure of due process required to prevent arbitrary and oppressive official action. *Morrissey v. Brewer, supra,* 408 U.S. 471, the seminal parole revocation case described above, preceded *Mathews,* but *Morrissey* cited to *Mathews'* antecedents in reaching its conclusions. (See *Morrissey, supra,* 408 U.S. at 481, citing *Goldberg v. Kelly, supra,* 397 U.S. 254, 263; *Fuentes v. Shevin, supra,* 407 U.S. 67.) While *Mathews* did not involve claims arising in a parole context, that does not appear significant; procedural due process jurisprudence employs the same three-part test regardless of the context in which the claim arises. (See *Greenholtz v. Inmates, Nebraska Penal & Correctional Complex* (1979) 442 U.S. 1 [applying the *Mathews* test in a civil rights case challenging a state's parole suitablility framework on due process grounds].) Although the same standard applies, context must still be considered.

The first factor in assessing the process due is the nature of the liberty interest at stake. (See *Mathews, supra,* 424 U.S. at 341, citing *Morrissey, supra,* 408 U.S. at 471.) After identifying the nature of the right at issue, the second factor is the risk of an erroneous deprivation of conditional liberty under the procedures employed, and the likely value of additional or substitute procedural safeguards. (*Ibid.*) The court must consider "the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards." (*Mathews, supra,* at 343.) The third factor is that the court must consider the administrative burden and other societal costs, or benefits, which might be associated with requiring more process as a matter of constitutional law. (*Id.* at 347.) Considering these three factors, this Court must determine what process is due when a parolee's liberty interest is endangered by a claimed violation of the terms of parole.

The Court of Appeal below applied the *Mathews* procedural due process test but erroneously concluded *Mathews* did not require a preliminary probable cause hearing to parole revocation proceedings. (Opn. at 10.) The Fourth District in *Williams v. Superior Court*, on the other hand, correctly applied the *Mathews* test and held that due process mandated a prelimnary probable cause hearing within 15 days of a parolee's arrest. (*Williams v. Superior Court, supra,* 230 Cal.App.4th at 659-666.)

As to factor one, the private interest affected by the official action, the court in *Morrissey* noted, "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 the governmental action." (*Morrissey, supra,* 408 U.S. at 481, quoting *Cafeteria & Restaurant Workers Union v. McElroy* (1961) 367 U.S. 886, 895.) As *Morrissey* noted, the liberty interest at stake in cases such as the present case is a parolee's interest in retaining the "enduring attachments of normal life" so long as he or she does not violate the conditions of parole." (*Id.* at 482.) As noted above, it is self-evident that the liberty interest of a parolee is significant, and greater than the liberty interest of a prisoner still confined in the prison system. (*Ibid.)* Society has a stake in the parolee's liberty interest, too. To quote *Morrissey v. Brewer, supra,* 408 U.S. 471: "The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring a parolee to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. See *People ex rel. Menechino v. Warden,* 27 N.Y.2d 376, 379, and n. 2, 267 N.E.2d 238, 2389, and n. 2 (1971) (parole board has less than full picture of facts). And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." (*Morrissey v. Brewer, supra,* at 484.)

The procedures given DeLeon in superior court were not sufficient. Following realignment, the legislative goal of California's parole supervision framework is to get people back into the community. (Abarbanel et al., Realigning the Revolving Door: An

Analysis of California Counties' AB 109 2011-2012 Implementation Plans (2013) Stanford Criminal Justice Center 1-5.) The probable cause hearing is an essential component for testing the validity of the charged violation and for getting the revocation petition dismissed if there is no probable cause. A determination of probable cause without the opportunity to offer competing evidence and to subject the evidence offered against the parolee to cross-examination is not sufficient. Considerations of timing are important, too, as assessments are being made as to whether revocation is appropriate or interim sanctions are preferable. A parolee should not have to sit in jail until a final revocation hearing in the absence of probable cause. Counsel needs to be able to show the district attorney and the court the issues, and the strength or weakness of a case, in a timely manner, so as to catch mistakes quickly before a parolee's life and work are disrupted. An early evidentiary hearing is essential to show whether the legal elements have been met or not. There has to be a mechanism, and that is the probable cause hearing.

The second factor in the *Mathews* test is the risk of an erroneous deprivation of conditional liberty under the procedures employed, and the likely value of additional or substitute procedural safeguards. In order to protect a parolee's liberty interest, *Morrissey* requires procedures to guarantee not only that the state does not revoke parole without an adequate factual basis, but that parolees are not detained without some sort of assurance that there is probable cause to suspect a parole violation. The effect of detention itself, in its disruption of the parolee's family relationships, job, and life, is sufficiently significant to require such a procedure. Another type of procedure short of a probable cause hearing

would place a severe strain on an accurate fact-finding process. In terms of the three-part balancing test, the issue is whether greater process produces a more reliable result. Certainly when a probable cause determination has been made, society can have greater confidence that an unreliable result has not been produced.

The third factor considers the government's interest including the function involved and the fiscal or administrative burdens that additional procedures may impose. (*Mathews v. Eldridge, supra,* 424 U.S. at 335.) The court must balance the social interest in protecting an individual's interest in remaining at large with the state's interest in protecting the public from parolees who have violated the conditions of their parole. Moreover, while administrative inconvenience is a proper *Mathews* consideration, the inconvenience occasioned by a prompt probable cause hearing would not appear to be, in and of itself, a sufficient justification for the potentially catastrophic consequences of delay. Indeed, the United States Supreme Court seemed to view with equanimity the inconvenience that *Morrissey* engendered. (See *Gagnon v. Scarpelli, supra,* 411 U.S. at 782, n. 5 ("[s]ome amount of disruption inevitably attends any new constitutional ruling.") Moreover, the second *Mathews* factor would appear to require greater emphasis than the third factor, as the problem of additional expense does not justify the use of procedures that fall below optimal constitutional standards. (See *Goldberg v. Kelly, supra,* 397 U.S. at 261; *Mathews v. Eldridge, supra,* 424 U.S. at 348-349.)

Further offsetting the new types of challenges faced by the courts is the state's interest in the enforcement of rules providing for evidence-based sanctions to avoid

unnecessary, counterproductive incarcerations before the damage is done, e.g., loss of the parolee's housing, social support ties, and community stability. (See *Williams v. Superior Court, supra,* 230 Cal.App.4th at 660.) If the parole violation is also charged as a new felony, a preliminary hearing must in any event be set within 10 court days of a defendant's arraignment unless waived. (See Pen. Code, § 859b.) Under these circumstances, it could be anticipated the preliminary hearing would also address the probable cause issue on the parole violation, resulting in no additional court time. If the parole violation does not result in additional criminal charges, the probable cause hearing would not consume much time. The additional burdens imposed upon the courts do not outweigh the benefits to both the government and the parolee in avoiding further incarceration where the alleged violation is shown to lack probable cause. As to the burdens placed on the parole board, a 15-day time limit for a probable cause hearing may require them to make faster decisions on whether to seek revocation. This burden should not be insurmountable, especially if the Department of Corrections and Rehabilitation parole staff and the court collaborate to establish a workable system. (See *Williams v. Superior Court, supra,* at 660.)

Finally, the removal of the safeguard of an evidentiary probable cause hearing may well cause more mistakes, and, as a result, in some circumstances, such mistakes may *increase* the financial and administrative burden on the government. Surely it would cost money to incarcerate people who shouldn't be incarcerated. And should probable cause be found not to exist, there would be great savings in costs for the myriad later proceedings

that will be avoided. So eliminating a preliminary probable cause hearing is not necessarily more expeditious or cost-saving. Moreover, constitutional rights should not be sacrified to practical concerns which are ephemeral, subject to changes in the economy, the budget, court administration, and staffing decisions. These concerns should not triumph over longstanding, fundamental ideals. Financial cost alone should not control in determining whether due process requires a particular procedural safeguard. *(Mathews v. Eldridge, supra,* 424 U.S. at 348.)

While the problem of additional expense must be kept in mind, it does not justify denying a hearing compelled by the minimum standards of due process. Even though the balance which a court strikes in due process considerations is informed by an understanding that "due process is flexible and calls for such procedural protections as the particular situation demands," (*Morrissey, supra,* 408 U.S. at 481), flexibility should not permit something less than what the particular situation demands.

Balancing the *Mathews* factors, it must be determined that the process due when a parolee's liberty interest is endangered by a claimed violation of the terms of parole is a two-level procedure which includes a timely preliminary probable cause hearing. A unitary parole revocation hearing does not comport with the requirement of the federal Constitution's due process clause. The state's failure to conduct preliminary probable cause hearings within 15 days would be unconstitutional.

D. Other Revocation Contexts In Which Courts Have Approved The Use Of A Unitary Revocation Hearing, Without Requiring A Preliminary Probable Cause Hearing, Are Distinguishable From The Parole Revocation Context

Although *Morrissey, supra,* 408 U.S. 471 addressed the parole revocation process, this Court intitially applied *Morrissey's* due process requirements, including probable cause determinations, to California's probation revocation process. *(People v. Vickers* (1972) 8 Cal.3d 451.) Shortly thereafter, this Court ruled that because of the due process usually afforded by California's judicial procedure, courts need not conduct formal probable cause hearings for probation violations. *(People v. Coleman* (1975) 13 Cal.3d 867, 894-895.)

Williams v. Superior Court, supra, 230 Cal.App.4th 636 correctly distinguished the probation context from the parole context as to the need for a preliminary probable cause hearing. (*Id.* at 654-656.) *Coleman,* a pre-alignment case, stated that generally it is not necessary in California to afford a probationer faced with revocation proceedings a probable cause hearing of the type normally provided in parole revocation proccedings. (*People v. Coleman, supra,* 13 Cal.3d at 894.) This Court explained in *Coleman* that probation revocation, unlike parole revocation, has "concomitant procedural benefits for a probationer at all stages of the revocation process." *(Ibid.)* Usually a judicial determination of probable cause precedes the arrest of a probationer for violations of his probation conditions, and the formal revocation hearing occurs shortly after the probationer has been deprived of his conditional liberty. The precise nature of probation revocation proceedings do not need to be identical to the bifurcated *Morrissey* parole

revocation procedures as long as "equivalent due process safeguards assure that a probationer is not arbitrarily deprived of his conditional liberty for any significant period of time and then a unitary hearing will usually suffice in probation revocation cases to serve the purposes of the separate preliminary and formal revocation hearings outlined in *Morrissey.*" (*People v. Coleman, supra,* at 894-895, cited in *Williams v. Superior Court, supra,* 230 Cal.App.4th at 654-655.)

As *Williams* noted, however, it is unclear whether a prompt unitary hearing can pass constitutional muster for parole revocation in light of the two hearings requirement of *Gagnon v. Scarpelli, supra,* 411 U.S. 778. Further, *Coleman's* approval of a single revocation hearing is conditional; it presumes the hearing will be held relatively soon after the person is arrested, and that the person will be afforded procedural benefits at all stages of the revocation process. During the period when a parolee is excluded from court, no procedural benefits are provided. (*Williams v. Superior Court, supra,* 230 Cal.App.4th at 654-655.)

Williams also discussed *People v. Woodall* (2013) 216 Cal.App.4th 1221, another probation revocation case. There, the defendant argued that Penal Code section 1203.2 violated the federal Constitution, both facially and as applied to him, because "it does not require a preliminary probable cause hearing before a final revocation hearing" as required by *Morrissey. (Id.* at 1227.) *Woodall* rejected the defendant's as-applied challenge to the statute because the trial court hearing had comported "with the *Morrissey* standards for a preliminary probable cause hearing." *(Id.* at 1239.) There, however, the hearing took

place only nine days after the defendant's arrest, he was represented by counsel, and was allowed to participate in the hearing. *(Id.* at 1228.) Most significantly, *Woodall* rejected the defendant's facial challenge to Penal Code section 1203.2 by construing the statute "to impliedly require a probable cause hearing if there is any significant delay between the probationer's arrest and a final revocation hearing." (*People v. Woodall, supra,* at 1238, cited in *Williams v. Superior Court, supra,* 230 Cal.App.4th at 656.)

In *In re Bye* (1974) 12 Cal.3d 96, this Court addressed the applicability of *Morrissey* in another context, analyzing the civil addict program and its related outpatient status provisions. (*Id.* at 96.) *Bye* held that "an outpatient's interest in his conditional liberty status is not unlike that possessed by a parolee and that he is entitled to certain procedural due process safeguards to protect that status from arbitrary revocation." (*Id.* at 100.) Among the minimum due process protections an outpatient must have was a revocation hearing. (*Id.* at 109-110.) However, *Bye* found that due process did not require a prompt preliminary in-community hearing for a California Rehabilitation Center outpatient suspected of violating the conditions of his release. (*Id.* at 106.) The necessity for immediate return for treatment of an addict if relapse occurred, and the need for immediate medical treatment to prevent an imminent return to narcotics, distinguished the civil addict program from the parole context. (*Id.* at 104-105.) *Bye* emphasized that delay in a parole situation is "highly undesirable since it may subject an innocent of the alleged violation to prolonged and unnecessary incarceration." (*Id.* at 106.) Such delay did not

present a serious threat to the rehabiltation achieved by an addict prior to an alleged violation. (*Ibid.*)

In re Anderson (1977) 73 Cal.App.3d 38 assessed the minimum due process protections that must be given insanity acquittee outpatients prior to revocation of that status. *Anderson* held that procedural due process requires trial courts to hold a *Morrissey* type revocation hearing prior to revoking an involuntarily committed person's outpatient status. (*Id.* at 48.) As to a preliminary hearing, *Anderson* found that a mental outpatient may fail to adjust to community life or suffer a relapse in his mental condition unrelated to the rigors of community life. As in the case of the CRC outpatient in *Bye,* the need for immediate recommitment was of paramount importance, both for public and patient well-being, and was a medical decision best made by someone well-versed in the patient's case history. Unlike the parole setting, an in-community preliminary hearing to establish probable cause before a neutral hearing officer was inappropriate. (*Id.* at 47.)

Under *Bye* and *Anderson,* then, significant functional differences between civil addicts and mental outpatients on the one hand, and parolees on the other, rendered an in-community prerevocation hearing as specified in *Morrissey* inappropriate. There were two primary reasons – the medical nature of the revocation decision, and the need for the prompt return of an addict in remission, or of a mental outpatient. (*In re Bye, supra,* 12 Cal.3d at 107-109; *In re Anderson, supra,* 73 Cal.App.3d at 46-47.)

Bye and *Anderson* are thus distinguishable from the parole context. In the cases of civil addict and insanity acquittee outpatients, unitary hearings were appropriate, and

perhaps even permissible under *Morrissey.* Not requiring probable cause hearings before final revocation hearings to return addicts and mental health outpatients to institutional care was determined to be medically beneficial. But while an addict or a mental health outpatient may decompensate without an immediate return to inpatient status, the same is not true of parolees. Rather, in the absence of a preliminary probable cause hearing in the parole context, an alleged violator or an innocent person may remain incarcerated unnecessarily; losing housing, social support ties, and community stability, and seeing his chances of rehabilitation diminished. (See *Williams v. Superior Court, supra,* 230 Cal.App.4th at 660.)

E. Dismissal Of Appellant's Parole Violation Finding Is Required Because Appellant Was Prejudiced By The Trial Court's Failure To Hold A Preliminary Probable Cause Hearing

Procedural due process rights for a valid prerevocation hearing were not satisfied in appellant's case. The delay was unreasonable. The violation resulted in an ambush that was a deprivation of due process. It was fundamentally unfair for the prosecution to proceed the way it did. The only effective sanction is dismissal of the parole violation.

Moreover, prejudice resulted. This Court has held that "a parolee whose parole has been revoked after a properly conducted revocation hearing is not entitled to have his revocation set aside unless it appears that the failure to accord him a prerevocation hearing resulted in prejudice to him at the revocation hearing." *(In re La Croix* (1974) 12 Cal.3d 146, 154.)

Appellant was arrested on August 23, 2013. (CT 5, 10; RT [9-11-13] 5; RT [9-25-13] 8.) On August 30, 2013, the Fairfield Parole Unit filed a petition to revoke his parole. (CT 1; RT [9-25-13] 8.) On September 6, 2013, the Solano County Superior Court, ex parte, found probable cause to support a revocation, and preliminarily revoked supervision. (CT 1; RT [9-25-13] 9.) At that point, appellant was not present and did not have an attorney appointed to him. (RT [9-25-13] 9.) On September 11, 2013, when appellant was appointed counsel and brought to court for the first time, his attorney requested an immediate dismissal on grounds that appellant's statutory due process rights had been violated. (CT 2, 5, 10; RT [9-11-13] 4-5.) In response, the prosecutor requested that a written motion be filed. (RT [9-11-13] 5.) Defense counsel requested an immediate remedy of discharging the petition. (RT [9-11-13] 5-6.) The judge asked for briefing, and continued the hearing. (RT [9-11-13] 7.) After briefs were filed, a hearing on the motion to dismiss was held on September 25, 2013, after which the court denied the motion to dismiss. (CT 16; RT [9-25-13] 4, 10.) On October 3, 2013, a contested hearing on the alleged parole violation was held and appellant was found in violation. (CT 19-20; RT [10-3-13] 4, 35-37.)

There was a delay in the appointment of counsel and appellant was denied the ability to meet with an attorney and prepare for a probable cause hearing. Appellant was prejudiced by the denial of counsel before a timely probable cause hearing. He was unable to exchange information with counsel or receive advice of counsel before a timely probable cause hearing. He was unable to provide counsel with information to

use in his defense before a timely probable cause hearing. Further, he was denied a timely probable cause hearing within 15 days of his arrest (which would have been September 7, 2013) at which he was present and represented by counsel. As such, he did not have the opportunity to present witnesses and evidence at a probable cause hearing. His deputy public defender was unable to perform the functions of counsel at a timely probable cause hearing. The delay in getting appellant an attorney meant more time for witnesses to depart, evidence to be lost, and appellant to forget events. The defense was precluded from doing initial investigation and producing witnesses. Defense counsel was deprived of making more intelligent decisions as to strategy.

At a timely probable cause hearing, trial counsel could have argued that probable cause did not exist that the items in appellant's possession constituted a violation of appellant's parole.[2] Had counsel prevailed, appellant would have been released from jail forthwith.

More specifically, had appellant been accorded a timely preliminary probable cause hearing, prior to that hearing his trial counsel would have been able to view the video and photographs taken from appellant's cell phone. (RT [10-3-13] 28-35). He could have argued (as he started to later) that the material was not obscene under the United States

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2 At the revocation hearing, the judge alluded to two parole conditions having been violated: "possession of pornography," and "possess materials that depict children in undergarments." (RT [10-3-13] 35-36.) He appeared to be referencing Conditions No. 49 ["You shall not view possess, or have access to any pornographic material, i.e, movies, photographs, drawings, literature, etc."] and No. 50 ["You shall not view, possess, or have access to any material, i.e., periodicals, newspapers, magazines, catalogs that depict adults or children in undergarments, nude, partially nude, etc."]. (SCT 24.)

Supreme Court's definition. (RT [10-3-13] 35.) He could have investigated and prepared other convincing arguments showing no probable cause. He could have argued that a video and photographs were not contemplated by Condition No. 50 which prohibited "periodicals, newspapers, magazines, catalogs . . . ." (SCT 24.) He could have argued those parole conditions should be deemed to have a knowledge requirement (see e.g., *People v. Pirali* (2013) 217 Cal.App.4th 1531, 1533; *People v. Rodriguez* (2013) 222 Cal.App.4th 578, 595-594), and that appellant did not *knowingly* possess the items. Thus, he could have argued, probable cause did not exist that appellant violated his parole. Had he prevailed, the parole violation would have been dismissed, and appellant would have forthwith been released from jail.

Once counsel was appointed on September 11, 2013, he immediately tried to have the petition discharged. Because the trial court granted the prosecution's request for a written motion, defense counsel had to deal with the extended proceedings on the motion to dismiss until September 25, 2013. He then had eight days, until October 3, 2013, to prepare for the revocation hearing.

Even if the trial court had found probable cause, defense counsel would have had a good start on preparing a defense. He could have made a convincing case that appellant's possession of the items did not meet the legal standard of preponderance of the evidence for violating specific parole conditions.

As it was, the defense was left in an untenable position at the revocation hearing as a result of the due process violation and the court's subsequent ruling. There was some

difficulty about notice, and with what charges to defend against (RT [10-3-13] 4-6 [where counsel complained of a lack of notice as to the charges]). There were problems with admissibility of certain documents (RT [10-3-13] 9-17, 19, 21, 23-24 [where the parties disputed over the admissibility of the parole violation report, the terms and conditions of parole, and the probable cause determination]). Defense counsel could have countered the allegations more effectively. He could have had more time to get an investigator, go to the scene, and examine exhibits. More specifically, he would have already viewed the exhibits of the photographs taken from appellant's cell phone and prepared a stronger defense. He could have refined his arguments from the probable cause hearing set forth above, arguing the exhibits did not show by a preponderance of the evidence that appellant had violated specific conditions of his parole.

Therefore, it cannot be "declare[d] without reservation that the denial in this case [of a timely prerevocation hearing] was harmless beyond a reasonable doubt." *(In re La Croix, supra,* 12 Cal.3d at 155, citing *Chapman v. California* (1967) 386 U.S. 18, 24.)

Moreover, another consideration exists. This Court has held, "We have rejected, as indicated by our foregoing discussion, petitioner's contention that in all instances of a wrongful denial of a timely prerevocation hearing a parolee must be released to parole status. (Footnote omitted.) We would impose such a severe sanction only on a showing that the [Board of Parole] Authority is unresponsive to mandates of *Morrissey* and its progeny and must be coerced to comply therewith." *(In re La Croix, supra,* 12 Cal.3d at 155.) Defense counsel argued below, "And Ms. DeBois [the prosecutor] is well aware of

this issue. I made the same objection last week. And it is an ongoing problem, and it is an easy fix. It may be bureaucratic, but we need to give these guys their due process rights and get them here to court for a probable cause determination on time. If the Court starts discharging petitions and making them go through this rigmarole, they will start getting these defendants here on time within the statutory time frame. And that is what needs to happen. It is not a hard fix." (RT [9/11/13] 7.) To the extent that the District Attorney's Office here can be deemed "unresponsive to mandates of *Morrissey* and its progeny and must be coerced to comply therewith" *(In re La Croix, supra,* 12 Cal.3d at 155), the need for a showing of prejudice may be abated.

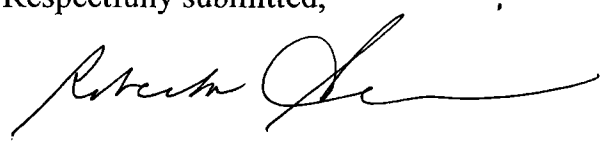
For all of the reasons set forth above, the sustained parole violation should be dismissed.

CONCLUSION

In keeping with United States Supreme Court precedent, governing statutes, and the legislative intent of the 2011 Realignment Act, a full probable cause hearing within 15 days of arrest should be required for parole violation hearings. For the foregoing reasons, petitioner respectfully requests that a timely preliminary probable cause hearing be held necessary upon revocation of parole.

Dated: April 15, 2016

Respectfully submitted,



ROBERTA SIMON
Attorney for Petitioner
Allen Dimen DeLeon

CERTIFICATE OF LENGTH

Re: *People v. Allen Dimen DeLeon* S230906

I, Roberta Simon, counsel for Allen Dimen DeLeon, certify pursuant to the California Rules of Court that the word count for this document is 9,193 words, excluding the tables, this certificate, and any attachment. This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Executed on April 18, 2016, at Oakland, California.

ROBERTA SIMON
Attorney for Petitioner
Allen Dimen DeLeon

DECLARATION OF SERVICE

Re: *People v. Allen Dimen DeLeon* S230906

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause; my business address is P. O. Box 10728, Oakland, California 94610. My electronic serving address is rsarasimon@hotmail.com. On April 18, 2016, I served a true copy of the enclosed Appellant's Opening Brief on the Merits on each of the following, by placing same in an envelope addressed respectively as follows:

Office of the District Attorney
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Each said envelope was then sealed and deposited in the United States Mail at Oakland, California, with the postage thereon fully prepaid.

On April 18, 2016, I transmitted a PDF version of this document by electronic mail to each of the following using the email addresses indicated:

First District Appellate Project
Attention: Jeremy Price, Esq.
[Via TrueFiling]

Office of the Attorney General
[Via TrueFiling]
For Respondent,
The People of California

Court of Appeal, First Appellate District (Div. 3)
[Via TrueFiling]

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Executed on April 18, 2016, at Oakland, California.

DECLARANT