SUPREME COURT
FILED

In the Supreme Court of the State of California

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Frank A. McGuire Clerk

Deputy

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ALLEN DIMEN DELEON,

Defendant and Appellant.

Case No. S230906

First Appellate District, Division Three, Case No. A140050
Solano County Superior Court, Case No. FCR302185
The Honorable Robert S. Bowers, Jr., Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

In light of the changes made to the parole revocation process in the 2011 Realignment Legislation (Stats. 2011, ch. 15; Stats. 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?

STATEMENT OF THE CASE AND FACTS

On August 23, 2013, a parole search was conducted in appellant's motel room. (10/3/13 RT[1] 27-28.) Law enforcement officers discovered two cell phones that appellant admitted were his. (10/3/13 RT 28.) One of the phones contained a video of a male masturbating and various photographs of teenagers and adult women showing their breasts and vaginal areas, sometimes in sexually explicit positions, and teenagers and pre-pubescent children wearing underwear. (10/3/13 RT 29-33.) That day, appellant was arrested for violating his parole. (Supp. CT 1.)

Three days later, the Division of Adult Parole Operations of the Department of Corrections and Rehabilitation (DAPO) determined that there was probable cause to support a revocation of parole. (Supp. CT 6-7.) On August 30, 2013, DAPO referred to the Solano County Superior Court a petition for revocation of parole alleging three parole violations: (1) possession of pornography; (2) possession of material that depicts children in undergarments; and (3) use of a computer or mobile phone to view sexually explicit material on a website. (CT 1; Supp. CT 1-32; 9/25/13 RT 8.) The petition for revocation was filed on September 4, 2016. (CT 1.)

On September 6, 2013, 14 days after appellant's arrest, the trial court reviewed the parole violation report submitted with the petition for

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[1] For the sake of clarity, respondent will refer to the volumes of reporter's transcript by date of the hearing.

revocation and found probable cause to support a revocation of parole. (CT 1; 9/25/13 RT 5, 10.) On September 11, 2013, 19 days after his arrest, appellant first appeared before the trial court, represented by counsel.[2] (9/25/13 RT 4.) At the hearing, appellant moved to discharge the petition and dismiss the parole violation due to a violation of his due process rights because he had not been given a probable cause hearing within 15 days of arrest. (CT 2; 9/11/13 RT 4-5.) The trial court ordered the parties to brief the issue. (9/11/13 RT 7.) The motion hearing was continued, and the final revocation hearing was set for October 3, 2013. (CT 2; 9/11/13 RT 7-8.) Appellant filed a written motion to dismiss on September 17, 2013. (CT 4-7.) The People filed an opposition a week later. (CT 10-15.)

On September 25, 2013, the trial court held a hearing on the motion to dismiss. (CT 16.) The court denied the motion. (CT 16; 9/25/13 RT 9.) It found that a judicial officer of the court had made a probable cause determination upon review of a full parole violation report within 15 days of appellant's arrest, which was sufficient to satisfy *Morrissey v. Brewer, supra,* 408 U.S. 471 (*Morrissey*), *People v. Vickers* (1972) 8 Cal.3d 451 (*Vickers*), and their progeny. (9/25/13 RT 8-10.)

On October 3, 2013, 41 days after appellant's arrest, the final revocation hearing was held. (CT 19-20.) The court sustained the petition, finding two parole violations relating to the first and second allegations in the petition. (10/3/13 RT 35-36.) The court then sentenced appellant to 180 days in county jail for the violations. (10/3/13 RT 37.)

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[2] Based on a lack of an affirmative indication in either the minute order or reporter's transcript that counsel was appointed on September 11 (CT 2), and counsel's indication that he had already received the case file (9/11/13 RT 5), it appears that counsel may have been appointed on an earlier date.

Appellant appealed, claiming that the trial court's failure to hold a timely probable cause hearing consistent with *Morrissey* violated his due process rights. On October 28, 2015, the Court of Appeal filed an opinion affirming the judgment, holding that the totality of the proceedings in the case afforded appellant constitutionally adequate process and that he was not prejudiced by any delay in promptly bringing him before the court. Rehearing was denied on November 20, 2015. This Court granted appellant's petition for review on February 3, 2016.

SUMMARY OF ARGUMENT

The due process protections required in parole revocation proceedings in California are governed by *Morrissey*, *Vickers*, and their progeny. Under these precedents, a parolee who is arrested and held in custody for an alleged parole violation must be afforded (1) an informal probable cause hearing[3] as promptly as convenient after arrest while information is fresh and sources are available to determine whether there is probable cause to believe the parolee has committed acts that would constitute a violation of parole conditions, and (2) an opportunity for a final revocation hearing within a reasonable time after being taken into custody before the final decision on whether parole should be revoked.

The informal probable cause hearing is a minimal inquiry akin to a preliminary hearing in criminal proceedings. The probable cause determination must be made by an independent officer who makes a record of the proceeding. The parolee must be given notice of the hearing and its purpose, including what parole violations have been alleged. At the

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[3] *Morrissey* referred to the hearing as a "preliminary hearing," and this court has alternatively referred to it as a "probable cause hearing" (*In re Law* (1973) 10 Cal.3d 21; see *id.* at p. 26, fn. 4) and a "prerevocation hearing" (*In re La Croix* (1974) 12 Cal.3d 146). For clarity, respondent will refer to the hearing as a probable cause hearing.

hearing, the parolee may appear, speak in his own behalf, bring letters, documents, or individuals that can provide information relevant to the determination, and question any person who gives adverse information against him.

The due process requirements are flexible enough that other independent hearings may satisfy the probable cause hearing requirement if they otherwise satisfy the same requirements. A unitary hearing, which serves the purposes of both the probable cause and final revocation hearings, may be appropriate if the hearing is held promptly after arrest. A prompt unitary hearing procedure meets the rationales supporting the probable cause hearing requirement, promotes judicial efficiency, and provides the flexibility necessary for all counties to effectively implement the mandates of due process. California and other jurisdictions have approved of a timely unitary hearing procedure for both parole revocation and probation revocation proceedings. Penal Code[4] section 1203.2, which governs parole revocation proceedings, provides for a timely unitary hearing procedure.

Temporally, due process requires only that the informal probable cause hearing be conducted as promptly as convenient after a parolee's arrest for an alleged parole violation. Neither *Morrissey* nor the due process balancing test in *Mathews v. Eldridge* (1976) 424 U.S. 319 (*Mathews*) requires a separate probable cause hearing to take place within 15 days of arrest or within any set number of days. *Williams v. Superior Court* (2014) 230 Cal.App.4th 636 (*Williams*), which required a probable cause hearing to be held within 15 days of arrest, should not be followed because it relied on a state statute that does not apply to parole revocation

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[4] All further statutory references are to the Penal Code unless otherwise specified.

proceedings conducted by the superior courts pursuant to section 1203.2 and because its holding was based on a showing that the due process rights of parolees were being systematically violated in Orange County. The specific requirements deemed necessary to fix the manifest procedural inadequacies in Orange County should not be forced upon any other county in the absence of a showing that the parole revocation process in that county also systematically violated the due process rights of parolees.

Due process was not satisfied in this case because appellant did not receive a hearing as promptly as convenient after arrest that satisfied all of the constitutional requirements for a probable cause hearing. However, appellant was not prejudiced by any constitutional violation because he received a timely, fair, and proper final revocation hearing before his parole was revoked. Therefore, he is not entitled to have his parole violation set aside or dismissed.

ARGUMENT

I. WHEN A PAROLEE IS ARRESTED AND HELD IN CUSTODY FOR AN ALLEGED PAROLE VIOLATION, DUE PROCESS REQUIRES THAT THE PAROLEE RECEIVE THE EQUIVALENT OF AN INFORMAL PROBABLE CAUSE HEARING AS PROMPTLY AS CONVENIENT AFTER ARREST; APPELLANT DID NOT RECEIVE SUCH A HEARING IN THIS CASE, BUT HE WAS NOT PREJUDICED BY ANY ERROR

Appellant complains that the superior court failed to hold a timely probable cause hearing consistent with state law and constitutional procedural due process principles prior to revoking his parole. He contends that the failure to hold a probable cause hearing within 15 days of his arrest requires dismissal of the charged parole violation. (AOB 8-36.)

The constitutional requirements of a probable cause hearing in a parole revocation proceeding conducted by the superior court pursuant to section 1203.2 are governed by *Morrissey* and its progeny. A probable

cause hearing, which may be informal and may be unified with a final revocation hearing or other similar proceeding, must only be conducted "as promptly as convenient" after the parolee's arrest. (*Morrissey, supra,* 408 U.S. at p. 485.) Respondent submits that the superior court's probable cause determination in this case did not satisfy the constitutional requirements set forth in *Morrissey*. However, appellant did not suffer any prejudice from the court's constitutionally-deficient probable cause determination. Therefore, dismissal is not required.

A. Relevant Law Concerning Parole Revocation Proceedings

Historically in California the power to revoke parole was vested in the executive branch in the Department of Corrections and Rehabilitation, not the courts. (*In re Prather* (2010) 50 Cal.4th 238, 254.) The proper function of the courts in respect to the revocation of parole was simply to ensure that the parolee was accorded due process. (*Ibid.*)

As part of the 2011 Realignment Legislation, the superior courts assumed jurisdiction for the purpose of hearing petitions to revoke parole in most instances beginning on July 1, 2013. (§ 3000.08; Stats. 2011, ch. 39, § 38 (AB 117); Stats. 2011-2012, 1st Ex. Sess. 2011, ch. 12, § 18 (ABX1 17).) In follow-up legislation in 2012, the procedure for parole revocation proceedings upon the filing of a petition to revoke parole was streamlined with the revocation procedures for other distinct forms of supervision (probation, mandatory supervision, and postrelease community supervision) to promote a uniform supervision revocation process. (§ 1203.2; Stats. 2012, ch. 43, §§ 2, 30, 35 (SB 1023).) Until then, section 1203.2 had traditionally applied only to probation revocation proceedings.

The system codified in sections 1203.2 and 3000.08 provides that if any parole officer or peace officer has probable cause to believe that a parolee has violated a term or condition of his parole, that officer may

either arrest the parolee, with or without a warrant, or alternatively the court may, in its discretion, issue a warrant for the parolee's arrest. (§§ 1203.2, subd. (a); 3000.08, subd. (c).) Upon internal review and a finding of good cause that the parolee has committed a violation of law or violated his or her conditions of parole, DAPO may impose additional and appropriate conditions of supervision and impose immediate, structured, and intermediate sanctions for parole violations. (§ 3000.08, subd. (d).) If DAPO determines that intermediate sanctions are not appropriate, it shall file a petition to revoke parole in either the court in the county in which the parolee is being supervised or the court in the county in which the alleged parole violation occurred. (§§ 1203.2, subd. (b); 3000.08, subd. (f).) The petition shall include a written report containing, among other things, the relevant terms and conditions of parole, the circumstances of the alleged underlying violation, the history and background of the parolee, any recommendations, and the reasons for the determination that intermediate sanctions without court intervention were inappropriate responses to the alleged violation. (§ 3000.08, subd. (f); Cal. Rules of Court, rule 4.541.) DAPO must give notice of its petition to the parolee. (§ 1203.2, subd. (b).) After consideration of the petition and report and finding that the parolee has violated the conditions of his parole, the superior court may modify or revoke parole if the interests of justice so require, including order confinement in the county jail for not longer than 180 days. (§§ 1203.2, subds. (a), (b)(1); 3000.08, subds. (f), (g).)

In passing Senate Bill 1023, the Legislature expressed its intent that the amendments to the parole revocation process were intended to incorporate the procedural due process protections held to apply to probation revocation procedures under *Morrissey*, *Vickers*, and their progeny. (Stats. 2012, Ch. 43, § 2.) In *Morrissey*, the United States Supreme Court held that due process requires that a parolee arrested and

held in custody for violating the conditions of his parole be afforded: (1) an informal preliminary hearing "as promptly as convenient after arrest while information is fresh and sources are available" 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 pp. 485-487), and (2) an opportunity for a revocation hearing "within a reasonable time after the parolee is taken into custody" and prior to the final decision on revocation that leads to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation (*id.* at pp. 487-489).

Morrissey described the required informal hearing to determine probable cause as "some minimal inquiry" akin to a "preliminary hearing" in criminal proceedings. (*Morrissey, supra*, 408 U.S. at p. 485.) "No interest would be served by formalism in this process; informality will not lessen the utility of this inquiry in reducing the risk of error." (*Id.* at p. 487.) *Morrissey* required that the probable cause determination be made by an independent officer—though it need not be a judicial officer—someone other than the parole officer who has made the report of parole violations or has recommended revocation. (*Id.* at pp. 485-486.) The parolee shall be given notice of the hearing and its purpose, including what parole violations have been alleged. (*Id.* at pp. 486-487.) At the hearing, the parolee may appear and speak in his own behalf. (*Id.* at p. 487.) He may bring letters, documents, or individuals who can give relevant information to the hearing officer. (*Ibid.*) On his request, a person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence unless the hearing officer determines that such questioning would risk harm to the person. (*Ibid.*) The hearing officer has the duty to make a summary or digest of what occurs at the hearing, to determine, based on the evidence before him, whether there is probable

cause to hold the parolee for the final decision on revocation, and to state the reasons for the determination. (*Ibid.*)

The California Supreme Court clarified that other independent hearings, such as preliminary hearings in cases where the conduct which constitutes a prima facie violation of parole is also independently charged as a new felony, may also satisfy the probable cause hearing requirement mandated by *Morrissey* in parole revocation cases. (*In re Law, supra*, 10 Cal.3d at p. 27; *In re La Croix, supra*, 12 Cal.3d at pp. 151-153.) The court noted that the practice would, in appropriate cases, eliminate needless duplication and prevent the parolee from being subjected to two proceedings. (*In re Law,* at p. 27.) No purpose would be served by requiring an independent probable cause hearing in such instances when the parolee already receives its equivalent. (*Ibid.*)

The due process requirements articulated in *Morrissey* were also applied to probation revocation proceedings conducted pursuant to section 1203.2. In *Vickers*, the court determined that it could not distinguish between parole revocation and probation revocation for purposes of due process. (*Vickers, supra*, 8 Cal.3d at p. 458.) It recognized, however, that the precise nature of the proceedings need not be identical if they assure "equivalent due process safeguards." (*Ibid.*) In addition, *Vickers* created a judicially declared rule of criminal procedure that a probationer is entitled to the representation of retained or appointed counsel at formal probation revocation proceedings. (*Id.* at pp. 461-462.) Subsequently in *People v. Coleman* (1975) 13 Cal.3d 867, the court clarified that a unitary hearing, combining both the preliminary hearing and the formal revocation hearing, will usually suffice in probation revocation proceedings so long as "equivalent due process safeguards" assure that the probationer is not

arbitrarily deprived of his conditional liberty for any "significant period of time."[5] (*Id.* at pp. 894-895.) The court reasoned that probation revocation proceedings are judicial proceedings with concomitant procedural benefits for a probationer at all stages of the revocation process, often including a judicial determination of probable cause preceding the arrest and a formal revocation hearing relatively soon after arrest. (*Ibid.*)[6]

B. Due Process Requires An Informal Probable Cause Hearing "as Promptly as Convenient" after A Parolee's Arrest for An Alleged Parole Violation Prior to The Revocation of Parole

Respondent agrees with appellant that due process, as articulated in *Morrissey*, requires some sort of probable cause hearing after a parolee's arrest for an alleged violation of parole prior to revoking parole for that violation. Just as it was concluded in *Vickers*, respondent cannot distinguish parole revocation proceedings from probation revocation proceedings under the current state of California law "in principle insofar as the demands of due process are concerned." (*Vickers, supra*, 8 Cal.3d at p. 458.) However, the constitutional requirements concerning the nature and timeliness of the probable cause hearing do not require such a rigid

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[5] Although the court in *In re La Croix* did not reach the question of whether a unitary hearing could satisfy *Morrissey*, it did suggest that a unitary hearing held within a few weeks of arrest might suffice in the parole revocation context. (*In re La Croix, supra*, 12 Cal.3d at p. 153, fn. 3.)

[6] *Morrissey*, *Vickers*, and their progeny apply only when the parolee remains in custody pending parole revocation proceedings. (*In re La Croix, supra*, 12 Cal.3d at p. 152, fn. 2; *Vickers, supra*, 8 Cal.3d at pp. 460-461.) Effective January 1, 2016, the superior court has the authority to release a parolee from custody under any terms and conditions it deems appropriate after an arrest for an alleged parole violation. (§§ 1203.2, subd. (a), 3000.08, subd. (c), 3056, subd. (a); Stats. 2015, ch. 61, §§ 1-3 (SB 517).) Should the superior court exercise that authority, *Morrissey*, *Vickers*, and their progeny will no longer apply to that particular parolee.

procedural structure as set forth in *Williams v. Superior Court*, *supra*, 230 Cal.App.4th 636.

Admittedly, there are some distinctions between the parole revocation process at issue in *Morrissey*, the probation revocation process to which *Morrissey* was applied in *Vickers,* and California's current parole revocation process after the enactment of the Realignment legislation. They are distinctions without a difference, however, when it comes to the application of *Morrissey*'s due process requirements. In light of this Court's precedents and the uniform revocation process provided for in section 1203.2, *Morrissey*'s requirements, and specifically the requirement of a probable cause hearing, should apply to the parole revocation proceedings in this case just as they apply to probation revocation proceedings.

While not completely disregarding *Morrissey* altogether, the Court of Appeal concluded that *Morrissey* governed the measure of due process required in parole revocation proceedings conducted by an administrative agency, not by the courts. (Slip opn. at pp. 3, 5, 10.) It is true that parole revocation proceedings are now judicial proceedings rather than administrative agency proceedings but that does not appear to be a sufficient reason not to apply *Morrissey*. *Morrissey* itself acknowledged that the administrative agency may sometimes be an "arm of the court" rather than of the executive branch, indicating the potential for the decision to apply to judicial proceedings as well. (*Morrissey, supra*, 408 U.S. at p. 480.) And despite the fact that probation revocation proceedings are and always have been judicial proceedings in California, this Court has nevertheless held that *Morrissey* is applicable to probation revocation proceedings. (*Vickers, supra*, 8 Cal.3d at pp. 458-461.)

The Court of Appeal also noted that parole revocation hearings no longer occur at locations remote from the place of arrest, such as a state

prison, as was contemplated by *Morrissey*. (Slip opn. at p. 8.) Indeed, the parole revocation proceedings will be held in the court in either the county in which the parolee is supervised or the county in which the alleged parole violation occurred. (§§ 1203.2, subd. (b)(1), 3000.08, subd. (f).) But again, the same is true of probation revocation proceedings, to which *Morrissey* already applies.

The Legislature has also expressed the intent for *Morrissey* and *Vickers* to apply to parole revocation proceedings. When it amended sections 3000.08, subdivision (f), and 1203.2 to apply probation revocation procedures to parole revocation proceedings, it expressly stated its "intent that these amendments simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under [*Morrissey*] and [*Vickers*] and their progeny." (Stats. 2012, Ch. 43, § 2.) Section 1203.2 is constitutionally valid.[7] (*People v. Woodall* (2013) 216 Cal.App.4th 1221, 1237.) Though the prescribed pre-petition procedure is not identical for each type of supervision, owing largely to the application of sections 3000.08 and 3455 for parole and postrelease community supervision (PRCS), the Legislature has ensured that the same post-petition procedure shall be uniformly applied for revocation proceedings of all types of supervision. To apply different procedural standards to parole and probation revocation proceedings once judicial proceedings have commenced would be confusing, burdensome, and contrary to legislative intent.

In light of *Morrissey*'s application to probation revocation proceedings and the recent application of those procedures to parole revocation proceedings, it appears that *Morrissey*'s requirements should

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[7] Appellant does not challenge the constitutionality of section 1203.2.

apply to the parole revocation proceedings in this case.[8] Thus, appellant was constitutionally entitled to an informal probable cause hearing before an independent officer, who makes a record of the hearing, held "as promptly as convenient after arrest," with notice of the hearing and its purpose, and at which he could appear and speak on his own behalf, bring letters, documents or individuals to give relevant information and have an opportunity to question any individual who presents adverse information in support of revocation. (*Morrissey, supra*, 408 U.S. at pp. 485-487.)

It is important to stress that the nature of the probable cause hearing required by due process may be quite informal, no doubt stemming from the conclusion that the "full panoply of rights" due a defendant in a criminal prosecution does not apply to parole revocations. (*Morrissey, supra*, 408 U.S. at p. 480.) *Morrissey* was clear that the probable cause hearing is a "minimal inquiry" at which formalism would serve no interest given the fact that it would be followed by a more formal revocation hearing at which a final determination would be made. (*Morrissey, supra*, 408 U.S. at pp. 485, 487.)

It follows from such informality that the probable cause hearing need not require adherence to technical rules of procedure or evidence. (See *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 786-787 [referring to the "informal nature of the proceedings and the absence of technical rules of

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[8] It appears that *Morrissey* would be equally applicable to PRCS revocation proceedings. An important difference in the PRCS context, however, is that section 3455, subdivision (b)(1), provides for the arrested supervisee to be brought before the probation department (the PRCS supervising agency) prior to the filing of the petition. An informal probable cause hearing conducted by the probation department would potentially satisfy the probable cause hearing requirement in *Morrissey*. Of course, nothing in *Morrissey* precludes DAPO from holding its own informal probable cause hearing to satisfy due process in the parole revocation context.

procedure or evidence"].) Given that the defendant may present letters or documents on his behalf, it appears that evidentiary restrictions at the probable cause hearing are relaxed and that hearsay is constitutionally permitted. (See *People v. Buford* (1974) 42 Cal.App.3d 975, 982-983 [the use of hearsay evidence in the context of a revocation hearing is not error under *Morrissey* or section 1203.2].) In the case of a superior court that relies solely on a parole violation report, *Morrissey*'s requirement that a parolee be given an opportunity to question a person who gives adverse information on which his parole revocation is to be based would appear to be satisfied by simply allowing the questioning of the parole agent who authored the parole violation report. The degree of formality constitutionally required certainly should be no more than that of a preliminary hearing in a criminal proceeding, a direct comparison made by *Morrissey*, at which hearsay evidence is admissible to support a probable cause determination (see *Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1070-1083), or that of a final revocation hearing which also permits the use of hearsay evidence (see *Morrissey*, at p. 489 ["the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial"]; *Buford*, at pp. 982-983).

1. A unitary hearing may satisfy due process

The informal and flexible procedures articulated in *Morrissey* permit the use of a unitary hearing procedure to satisfy due process. When creating its two-stage process, *Morrissey* did not intend to lay down a rigid set of procedures requiring ritualistic adherence or to elevate form over substance. Rather, it prescribed a general framework to guide future parole revocation proceedings in order to guarantee that parolees are not deprived of procedural due process. As the Court stated, "due process is flexible and

calls for such procedural protections as the particular situation demands." (*Morrissey, supra*, 408 U.S. at p. 481.)

By noting that parolees cannot relitigate issues determined against them in other forums, *Morrissey* tacitly acknowledged the reality that certain aspects of its procedures may not be necessary or appropriate in all cases. (*Id.* at p. 490.) Indeed, *Morrissey* does not foreclose a summary resolution if an undisputed course of conduct constitutes, as a matter of law—as when the parolee has already suffered a criminal conviction based on that conduct—a parole violation. (*Moody v. Daggett* (1976) 429 U.S. 78, 86, fn. 7 [no probable cause hearing required]; *In re La Croix, supra*, 12 Cal.3d at pp. 151-152 & fn. 2; *Vickers, supra*, 8 Cal.3d at p. 457, fn. 6.) Nor does it preclude the holding of the probable cause and final revocation hearings in close or immediate sequence to each other, or even in one unitary hearing, as long as due process protections are not infringed. (*Vickers*, at pp. 459, fn. 8, 461 ["if he is accorded *a hearing or hearings* which conform to *Morrissey* standards"], italics added.) Cases, as well as various other persuasive authorities, in both the parole revocation and probation revocation contexts have approved of a unitary hearing procedure in appropriate cases.

In the parole revocation context, an independent probable cause hearing is not necessary if some other hearing is held which otherwise satisfies the substantive requirements of a *Morrissey* probable cause hearing. A preliminary hearing following the filing of independent charges against a parolee may serve as the probable cause hearing in parole revocation proceedings, assuming the parolee had "fair notice of the nature and effect of a hearing intended to serve such a dual purpose."[9] (*In re Law,*

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[9] *In re Law* surmised that the protections afforded to a parolee when he is accused of committing a new misdemeanor offense might, in

(continued...)

supra, 10 Cal.3d at p. 27.) The practice is encouraged because it eliminates needless duplication and prevents the parolee from being subjected to two proceedings. (*Ibid.*) This kind of flexibility also serves to permit prosecuting officers and courts a reasonable pragmatism in dealing with cases involving both new charges and parole violations that will ultimately result in an appropriate disposition for the particular conduct and the particular offender.

It follows then that, to the extent the final revocation hearing also satisfies the procedural requirements of a probable cause hearing, such a unitary hearing is sufficient to satisfy the due process requirements of *Morrissey*. In *In re La Croix*, though the court did not reach the question, it suggested that a unitary hearing would be appropriate if it otherwise met the *Morrissey* probable cause hearing requirements. (*In re La Croix, supra*, 12 Cal.3d at p. 153, fn. 3.) *Williams, supra*, 230 Cal.App.4th at pages 655-656, concluded that a proper unitary hearing might satisfy due process.

The unitary hearing practice is common in probation revocation proceedings. "[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*" because the formal revocation hearing occurs relatively soon after and at a place near the arrest. (*People v. Coleman, supra*, 13 Cal.3d at pp. 894-895; *People v. Buford, supra*, 42 Cal.App.3d at p. 980.) A separate probable cause hearing "is not mandated where the circumstances requiring it do not exist." (*People v. Buford, supra*, 42 Cal.App.3d at p. 981.) Again, the unitary hearing

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(...continued)
appropriate cases, also satisfy the probable cause hearing procedures mandated by *Morrissey*, though practical difficulties unique to misdemeanor procedure might preclude such practice. (*In re Law, supra*, 10 Cal.3d at pp. 27-28.)

procedure requires that the nature of the dual hearing be noticed to the probationer. (*People v. Coleman, supra*, 13 Cal.3d at p. 895.) Of course, a separate probable cause hearing may be required in probation revocation proceedings when the probationer is to be detained for any significant period of time before a final revocation hearing. (*Id.* at pp. 895-896.)

Section 1203.2, which now governs the parole revocation process, has been similarly interpreted. In *People v. Woodall, supra*, 216 Cal.App.4th at pages 1237-1238, the court construed section 1203.2 to impliedly require a probable cause hearing if there is any significant delay between arrest and the final revocation hearing.

The Administrative Office of the Courts (AOC), citing *Morrissey*, *Vickers*, *Coleman*, and the amendments to sections 1203.2 and 3000.08, has declared that a unitary hearing procedure is proper in appropriate parole revocation cases. In a publication intended to address frequently asked questions regarding post-Realignment parole revocation proceedings, the AOC pronounced that a separate probable cause hearing held at or near the time the parolee is taken into custody on a parole violation is not always required. (Administrative Office of the Courts, Parole Revocation Proceedings: FAQs, June 26, 2013, pp. 5-6, at http://www.courts.ca.gov/partners/documents/FAQs-Parole-Revocation-Proceedings.pdf [as of June 6, 2016].) The AOC also noted that, while not required by *Morrissey*, "prudent courts may wish to make [a probable cause determination] at the time of the parolee's arraignment on the violation, particularly when the arrest was not by warrant." (*Id.* at p. 6.)[10]

California courts have approved of a unitary hearing procedure in other contexts as well when the circumstances justifying a separate

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[10] The Solano County District Attorney's Office relied on this publication in the superior court proceedings. (CT 12-13.)

probable cause hearing do not exist or are overridden by other legitimate concerns. In *In re Bye* (1974) 12 Cal.3d 96, the court held that a unitary hearing was appropriate for the finding of a violation of a condition of outpatient status by someone in the civil addict program. And in *In re Anderson* (1977) 73 Cal.App.3d 38, the court approved of the same procedure for revoking a person's status as a mental outpatient.

Other jurisdictions have also determined that a prompt unitary hearing procedure satisfies *Morrissey*'s due process requirements. (*Ellis v. District of Columbia* (D.C. Cir. 1996) 84 F.3d 1413, 1424 [unitary hearing within 30 days of arrest]; *State v. Myers* (Wash. 1976) 545 P.2d 538, 544 [unitary hearing within 30 days of arrest]; *Pierre v. Washington State Bd. Of Prison Terms & Paroles* (9th Cir. 1983) 699 F.2d 471, 473 [unitary hearing 21 days after arrest]; *Richardson v. New York State Bd. of Parole* (1973) (N.Y.App.Div. 1973) 341 N.Y.S.2d 825 [unitary hearing 19 days after arrest].) It does not appear that any court has indicated a unitary hearing occurring more than 30 days after arrest would qualify as a "prompt" probable cause hearing under *Morrissey*. (See *L.H. v. Schwarzenegger* (E.D.Cal. 2007) 519 F.Supp.2d 1072, 1084-1085.)

A prompt unitary hearing meets the rationales behind the probable cause hearing requirement. *Morrissey* reasoned that a prompt probable cause hearing is required because: (1) there is typically a substantial lag time between arrest and the final revocation determination, and (2) the final revocation hearing may occur at a place distant from where the parolee was arrested and, presumably, from where the parole violation occurred. (*Morrissey, supra*, 408 U.S. at p. 485.) A prompt probable cause hearing would ensure a hearing takes place "while information is fresh and sources are available." (*Ibid.*)

A prompt unitary hearing under California's current parole revocation scheme adequately addresses *Morrissey*'s due process concerns. Parole

revocation hearings are judicial proceedings that take place in either the county where the alleged violation occurred or the county of the parolee's supervision. (§§ 1203.2, subd. (b); 3000.08, subd. (f).) In other words, the revocation hearing will generally occur in the same area where all the relevant evidence and witnesses can be found so as to afford the parolee a better opportunity to present them. (*People v. Buford, supra*, 42 Cal.App.3d at p. 980.) A unitary hearing under section 1203.2 is also held "relatively soon" after arrest (*People v. Coleman, supra*, 13 Cal.3d at p. 894) so as to eliminate any substantial lag time and ensure that information related to the alleged parole violation is still relatively fresh and available. As respondent has shown, a period of up to 30 days does not appear to be a significant delay between arrest and a final revocation hearing. Because the circumstances requiring a separate probable cause hearing no longer exist, one should not be mandated in every case. (*People v. Buford, supra*, 42 Cal.App.3d at p. 981.) Thus, a prompt unitary hearing procedure fully satisfies the due process requirements enunciated in *Morrissey*.

A unitary hearing procedure also promotes judicial efficiency and prevents redundancy that would needlessly overburden the courts and the parties. (*In re Law, supra*, 10 Cal.3d at p. 27.) Otherwise, superior courts would be required to hold two separate hearings in each case, both occurring promptly after arrest and involving the same evidence and arguments, that would essentially mirror each other except that one would conclude with a judicial finding of probable cause while the other would result in a final determination of whether a parole violation occurred. The first hearing would serve no purpose not also served by the final revocation hearing. A unitary hearing procedure would additionally ease the similar hardship that two duplicate hearings close together in time would impose on counsel, the parolee, and any witnesses.

Allowing for a unitary hearing procedure would also echo *Morrissey*'s careful provision of flexibility necessary for states to create a parole revocation system tailored to fit their particular needs and justice systems. *Morrissey* was clear that it was the responsibility of each state to develop precise procedures responsive to its mandates and that its intent was not to "write a code of procedure." (*Morrissey, supra*, 408 U.S. at pp. 488-490.) Permitting counties to adopt a proper unitary hearing procedure, as the practical circumstances in each county may dictate, would seem to similarly provide for a reasonable, flexible solution to *Morrissey*'s mandates while still satisfying its minimum due process requirements.

Relying on *Williams, supra*, 230 Cal.App.4th at pages 655-656, appellant claims that it is unclear whether a prompt unitary hearing will satisfy due process for parole revocation proceedings in light of *Gagnon v. Scarpelli, supra,* 411 U.S. 778. (AOB 28.) In *Gagnon*, the United States Supreme Court generally described *Morrissey* as requiring two hearings, which it then applied to probation revocation proceedings. (*Id.* at pp. 781-782, 786.) However, the Court also clarified that *Morrissey* did not intend to foreclose the states from "developing other creative solutions to the practical difficulties of [its] requirements." (*Id.* at p. 782, fn. 5.) *Gagnon* did not address the issue of whether any circumstances would constitutionally permit a unitary hearing. The Supreme Court's subsequent acknowledgement of circumstances which would render a probable cause hearing unnecessary demonstrates that two distinct hearings are not always required. (*Moody v. Daggett, supra*, 429 U.S. at p. 86, fn. 7.) Respondent also notes that most of the California decisions approving of a unitary hearing procedure were issued after *Gagnon*. Thus, *Gagnon* does not cast doubt on the constitutionality of a prompt and proper unitary hearing procedure.

2. Temporally, due process requires only that the probable cause hearing occur "as promptly as convenient" after the parolee's arrest

Morrissey requires that the probable cause hearing be held "as promptly as convenient" after the parolee's arrest. (*Morrissey, supra*, 408 U.S. at p. 485.) In *Williams, supra*, 230 Cal.App.4th 636, Division Three of the Fourth District Court of Appeal held that due process requires the probable cause hearing to take place within 15 days of the parolee's arrest.[11] Appellant encourages this Court to follow *Williams* and hold that a probable cause hearing must be held within 15 days of arrest, rather than the more flexible "as promptly as convenient after arrest" standard articulated by *Morrissey*. (AOB 10-12, 27-31.) Due process does not require such a rigid standard.

As respondent has explained, *Morrissey* established minimum due process standards while maintaining the flexibility necessary for states to implement its mandates. It did not require any events to take place in a certain number of days. Rather, its requirements that the hearings take place "as promptly as convenient" and "within a reasonable time" after arrest demonstrate timeliness standards governed by considerations of reasonableness based on the individual circumstances in each case. Likewise, sections 1203.2 and 3000.08 are flexible statutes that allow counties to implement a unitary hearing procedure and do not require them to adhere to any strict timeline in the parole revocation process. *Williams'*

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[11] The rules pronounced in *Williams* operate prospectively only, just as the rules pronounced in *Morrissey*. (See *Williams, supra*, 230 Cal.App.4th at p. 665 ["in the event of any future incarceration"]; see also *Morrissey, supra*, 408 U.S. at p. 490 ["applicable to future revocations of parole]; *Vickers, supra*, 8 Cal.3d at p. 462 & fn. 12.) Because the parole revocation proceedings in this case occurred prior to *Williams*, *Williams* does not apply to appellant.

holding runs contrary to these governing principles of reasonableness on a case-by-case basis.

There are other reasons not to follow *Williams* as well. The 15-day deadline *Williams* imposed for probable cause hearings was based predominantly on section 3044. Section 3044 is directed to the "Board of Parole Hearings or its successor in interest" and limits the procedural protections the agency may provide to parolees facing revocation, including a probable cause hearing within 15 days of arrest (§ 3044, subd. (a)(1)). Although the list of procedural rights itself is written in generally applicable language (§ 3044, subd. (a)(1)-(6)), it is clear that the section as a whole is directed specifically to the Board of Parole Hearings (BPH) or a successor agency of the executive branch of government that reports directly to the Governor. (§ 3044, subds. (a) & (b).) The BPH still exists and is still charged with being "responsible for protecting victim's rights in the parole process." (§ 3044, subd. (a).) In any event, the superior courts cannot be considered a successor in interest to the BPH, and they do not report to the Governor. (*Williams, supra*, 230 Cal.App.4th at p. 658.) Section 3044 simply does not apply to parole revocation proceedings conducted by the superior courts pursuant to section 1203.2.[12,13]

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[12] Appellant does not argue that the time limits related to the *Valdivia* litigation and settlement should be applied here, so respondent does not address it in depth. (See *Valdivia v. Brown* (E.D.Cal. 2013) 956 F.Supp.2d 1125.) However, that litigation does explain defense counsel's uncertainty at the time of the superior court proceedings concerning the application of section 3044, subdivision (a)(2). (9/25/13 RT 5-6; see *Valdivia v. Brown* (E.D.Cal. Jan. 24, 2012, No. Civ. S-94-671 LKK/GGH) 2012 U.S.Dist. Lexis 8092.)

[13] Appellant does not argue that section 3044 should also apply to probation revocation proceedings under section 1203.2. Thus, appellant's application would cause the anomalous situation of requiring a more cumbersome process for proving a parole violation, which generally carries

(continued...)

Appellant argues that section 3044 still applies to parole revocation proceedings despite their judicial nature because, as *Williams* explained, it was passed as part of a voter initiative and was not properly amended or repealed. (AOB 11-12; *Williams, supra*, 230 Cal.App.4th at pp. 658-659.) Section 3044 was enacted by the California voters as part of Proposition 9 in 2008 (*Williams*, at p. 649), but respondent submits that it was not amended or impliedly repealed by any Realignment legislation. (§§ 1203.2, 3000.08; Stats. 2012, ch. 43, §§ 2, 30, 35 (SB 1023).) Although parole revocation proceedings were generally shifted from the BPH to the superior courts, section 3044 still applies to hearings conducted by the BPH. Parole revocation proceedings pending on July 1, 2013, and those proceedings that were conducted prior to that date and then subsequently reopened after that date are still conducted by the BPH.[14] (§ 3000.08, subd. (j).) It also appears that some in-house parole revocation proceedings may be necessary in the event DAPO revokes the parole of a person who refuses to complete certain actions pursuant to section 3060.5. (Compare § 3060.5 ["the parole authority shall revoke [] parole"] with § 3000.08, subd. (f) ["the supervising parole agency shall, pursuant to Section 1203.2, petition...to revoke parole"].) Moreover, section 3044 does not contain any type of sunset clause. Thus, it will continue to apply to the parole revocation proceedings currently held by the BPH as well as any additional

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(...continued)
a sanction of no more than 180 days imprisonment in county jail, a far lesser sanction than for a probation violation, which can result in the imposition of a lengthy term in state prison.

[14] It is noteworthy that the character of the parole population has substantially changed since the enactment of section 3044 as well. Whereas the parole population was previously comprised of all felony offenders, after Realignment the parole population is made up of only the most serious and violent felony offenders. (§ 3000.08, subd. (a).)

parole revocation proceedings that the BPH may regain authority over in the future. For instance, in the event the superior courts become so overburdened by the additional duties imposed upon them by the Realignment legislation that a reduction in judicial workload becomes a necessary and desirable solution, the Legislature or the voters may decide to return some authority over parole revocation proceedings back to the BPH.

Even if section 3044 could apply to judicial parole revocation proceedings, a violation of section 3044 would not constitute a violation of a parolee's constitutional due process rights. A parolee's constitutional due process rights are set forth in *Morrissey*, *Vickers*, and their progeny. A violation of section 3044 would constitute merely a violation of state law, not a constitutional violation. (See *Cleveland Board Of Education v. Loudermill* (1985) 470 U.S. 532, 541 [constitutionally mandated requirements of procedural due process are found in the constitution, as interpreted by the courts, not in state statutes specifying certain procedures deemed adequate to address those requirements]; *Ellis v. District of Columbia, supra*, 84 F.3d at p. 1421, fn. 6 ["The mere fact that a state or local government has established certain procedures does not mean that those procedures thereby become substantive liberty interests entitled to federal constitutional protection."].)

Williams also should not be generally applied because its holding was the result of the court's conclusion that it was "manifest that the due process rights of parolees are being systematically violated in Orange County." (*Williams, supra*, 230 Cal.App.4th at p. 654.) Unlike the single probable cause hearing issue raised here, the issues raised in *Williams* were numerous and related to the entire parole revocation process, including parole holds, DAPO consideration of informal sanctions, formal notice of the allegations, the appointment of counsel, opportunities to present

evidence to mitigate sanctions, probable cause hearings, and final revocation hearings. (See *Williams, supra*, 230 Cal.App.4th at p. 653.) According to the court, "the procedures used in Orange County create[d] a high risk of an erroneous deprivation of a parolee's liberty interest." (*Id.* at p. 659.) The post-Realignment parole revocation process had been in place in Orange County for over a year, was well established, and was apparently satisfactory to everyone except parolees. (*Id.* at p. 657.) The court found it necessary to provide additional guidance regarding the timing of a probable cause hearing because of the many petitions for writ relief on the issue it had received within the previous year. (*Ibid.*) To the extent it may have been appropriate for *Williams* to impose a strict 15-day deadline for probable cause hearings, it was because such action was necessary, as part of the Court of Appeal's comprehensive solution, to fix Orange County's unique and demonstrably unconstitutional parole revocation process as a whole.

Moreover, *Williams* arose out of a petition for a writ of mandate, which allowed the appellate court to develop a record of the general parole revocation practices and procedures implemented in Orange County. (*Williams, supra*, 230 Cal.App.4th at p. 646.) The Orange County Superior Court generally assigned parole revocation proceedings only to one department, which only set such matters on Thursdays and categorically refused to hear them on any other day of the week even if calendar slots were available. (*Ibid.*) It imposed onerous filing deadlines unique to parole revocation petitions which caused some petitions not to be placed on calendar for the initial court appearance, an arraignment, for at least 10 days. (*Ibid.*) The superior court refused to allow defense witnesses to testify at the arraignment hearings, relying only on its review of a parole violation report. (*Id.* at pp. 646, 659.) Testimony was allowed only at final revocation hearings, which were generally scheduled for three weeks after

arraignment. (*Id.* at p. 646.) Parolees in Orange County averaged over 16 days in custody between arrest and arraignment and over 37 days in custody before the final revocation hearing. (*Ibid.*) Thus, parolees in Orange County did not receive anything that would satisfy *Morrissey*'s substantive probable cause hearing requirements until an average of 37 days after arrest. *Williams*' individualized consideration of Orange County Superior Court practices and procedures allowed it to conclude that although it might be a burden on the court to change its calendaring policies, the Orange County Superior Court, and specifically the department assigned to parole revocation matters, was well equipped to handle the 15-day deadline. (*Id.* at p. 660.)

Here, on the other hand, there is little in the record on appeal concerning the general parole revocation practices and procedures implemented in Solano County. What little evidence does exist indicates that those practices and procedures do not "systematically violate" parolees rights. Defense counsel indicated there was an "ongoing problem" that may be "bureaucratic" (9/11/13 RT 7), but there is no evidence in the record to support that statement. To the contrary, the superior court judge's statement that he was unclear why appellant's parole revocation matter was not first placed on calendar a week or two weeks earlier showed that the general process followed by the county was to place parole revocation matters on calendar sooner than occurred in appellant's case. (9/25/13 RT 9.) And it appears that the court was prepared to conduct a prompt unitary hearing before necessarily delaying the proceeding to fairly address appellant's motion to dismiss. Also noteworthy is the fact that the parole revocation proceedings took place in the fall of 2013, within approximately three months after the transfer of parole revocation proceedings to the superior courts. Thus, the parole revocation process was still relatively new, and it is likely that the county was still refining its process. *Williams*

should not be expanded to mandate such specific requirements for every county, especially when it has not been shown that the parole revocation processes implemented in other counties suffer from the same deficiencies that were prevalent in Orange County. (Cf. *People v. Seumanu* (2015) 61 Cal.4th 1293, 1372-1375 [court rejected claim on direct appeal when it was more appropriately presented in a habeas petition, where a defendant can present necessary evidence outside the appellate record].)

When enacting the Realignment scheme, the Legislature did not intend to micro-manage parole revocation proceedings and specify a single, meticulously detailed parole revocation process for all 58 counties to follow. Rather, the scheme was clearly intended to grant each county the flexibility to develop its own practices and procedures as it deemed appropriate while still adhering to the general process articulated in section 1203.2. Shoehorning every county's parole revocation process into the strict requirements articulated by *Williams* would be impracticable and contrary to the spirit of the Realignment legislation as well as the spirit of *Morrissey*. For instance, overburdened courts in smaller counties may only be able to devote one calendar per week to parole revocation proceedings (see 9/25/13 RT 9) without the ability or flexibility to satisfy such stringent deadlines. Though the solution devised by *Williams* may have been necessary and workable in Orange County, the same may not be true in other counties. A one-size-fits-all approach is inappropriate here. For all these reasons, *Williams* should be limited to its unique context and should not be broadly applied to all counties statewide.

C. Application of The Three-Factor Balancing Test in *Mathews v. Eldridge* (1976) 424 U.S. 319 Supports The Conclusion That Due Process Does Not Require Separate Hearings Or The 15-Day Deadline for Probable Cause Hearings Established by *Williams*

"It is axiomatic that due process is 'flexible and calls for such procedural protections as the particular situation demands.'" (*Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex* (1979) 442 U.S. 1, 12, quoting *Morrissey, supra*, 408 U.S. at p. 481.) Because of the broad spectrum of concerns to which due process must apply, flexibility is necessary so as to ensure that the quantum and quality of the process due in a particular situation depends on the need to serve the purpose of minimizing the risk of error. (*Greenholtz,* at p. 13.) For that reason, the United States Supreme Court developed a three-factor balancing test in *Mathews v. Eldridge*, *supra*, 424 U.S. 319 to determine what process is due. Those factors are: (1) the private interest that will be affected by the official action, (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (*Mathews*, at p. 335.) In determining what process is due in the parole revocation context, courts have appropriately turned alternatively to both *Morrissey* and *Mathews*, which generally yield the same results in light of the applicable "flexible" standard and their reliance on the same precedents.[15] As it can be expected then, application of the *Mathews* factors supports the conclusion that due process in parole revocation

[15] Analysis under the due process clauses of the California Constitution applies a similar test and would also yield the same result in this case. (See *People v. Ramirez* (1979) 25 Cal.3d 260, 269.)

proceedings does not require separate hearings or the *Williams* 15-day deadline for probable cause hearings in every case.

The first factor is the private interest that will be affected by the official action. (*Mathews, supra*, 424 U.S. at p. 335.) In this case, the private interest is a parolee's interest in conditional liberty, which is dependent on the observance of special parole restrictions. (*Morrissey, supra*, 408 U.S. at p. 480; *In re Taylor* (2015) 60 Cal.4th 1019, 1037.) In light of the many parole conditions that may govern a parolee's residence, his associates or living companions, his travel, his use of intoxicants, and other aspects of his life, the liberty of a parolee is partial and restricted compared to that of an average citizen. (*Morrissey*, at p. 482; *In re Taylor*, at p. 1037.) Upon a finding that a parolee has violated those conditions, the parolee is generally subject to imprisonment in the county jail for no more than 180 days (§ 3000.08, subds. (f)-(h)), which constitutes the maximum deprivation of liberty a parolee could suffer during parole revocation proceedings. Nevertheless, a parolee's liberty includes many of the core values of unqualified liberty and often more closely resembles that of an ordinary citizen than a prisoner. (*Morrissey*, at p. 482; *In re Taylor*, at pp. 1037-1038.) And, of course, a parolee retains basic constitutional protection against arbitrary and oppressive official action. (*In re Taylor*, at p. 1038.)

The second factor is the risk of erroneous deprivation of a parolee's conditional liberty interest through the procedures outlined by respondent, *ante*, and the probable value, if any, of the additional procedural safeguards proposed by appellant. (*Mathews, supra*, 424 U.S. at p. 335.) The risk of erroneous deprivation of a parolee's liberty interest through the procedures mandated by *Morrissey*, *Vickers*, their progeny, and sections 1203.2 and 3000.08 is relatively low. These authorities mandate that a parolee receive a probable cause determination at a hearing, the purpose of which he has

notice, at which he may appear and speak or present evidence on his own behalf and question anyone who gives adverse information on which the determination is to be based, and which is conducted by a judicial officer who ensures a record of the proceeding is created. The determination must be made "as promptly as convenient after arrest" when the information pertaining to the alleged violation is fresh and available. Additionally, a parolee is entitled to be assisted by counsel at the hearing. (§§ 1203.2, subd. (b), 3000.08, subd. (f); *Vickers, supra*, 8 Cal.3d at p. 461.)

There are other procedural safeguards as well, in addition to the probable cause hearing itself, that limit the risk of erroneous deprivation of a parolee's liberty interest. An officer must have probable cause to believe the parolee violated his parole to arrest him. (§§ 1203.2, subd. (a), 3000.08, subd. (c).) In some cases, a judicial officer will make a preliminary probable cause determination during the course of issuing a warrant for the parolee's rearrest. (§§ 1203.2, subd. (a), 3000.08, subd. (c); see *Couzens & Bigelow*, Felony Sentencing After Realignment, May 2016, p. 113, at www.courts.ca.gov/partners/documents/felony_sentencing.pdf [as of June 6, 2016] [citing § 813, subd. (a)].) DAPO must also make a finding of good cause that the parolee committed a parole violation before imposing intermediate sanctions, which it must consider prior to filing a petition to revoke parole. (§ 3000.08, subds. (d), (f).) It appears that the DAPO probable cause determination in this case was made by an independent officer rather than the supervising parole agent. (Supp. CT 7.) Prudent courts may voluntarily decide to make an additional probable cause determination during a parolee's arraignment. (Administrative Office of the Courts, Parole Revocation Proceedings: FAQs, June 26, 2013, pp. 5-6, at http://www.courts.ca.gov/partners/documents/FAQs-Parole-Revocation-Proceedings.pdf [as of June 6, 2016].) Thus, at least one probable cause determination, and possibly more, will have already been made prior to the

probable cause hearing, which limits the risk of erroneous deprivation of a parolee's conditional liberty.

There is also little potential for abuse when the relevant precedents are properly applied. "Control over the required proceedings by the hearing officers can assure that delaying tactics and other abuses sometimes present in the traditional adversary trial situation do not occur." (*Morrissey, supra*, 408 U.S. at p. 490.) The fact that California additionally offers parolees the opportunity to be represented by counsel at judicial revocation proceedings provides even more assurance that the parolee's constitutional rights will be protected. The potential for constitutional deprivation should not be minimized, but there are plenty of mechanisms in place to abate any risk in parole revocation proceedings. (Cf. *Gerstein v. Pugh* (1975) 420 U.S. 103, 127 (conc. opn. of Stewart, J.) ["The constitutionality of any particular method for determining probable cause can be properly decided only by evaluating a State's pretrial procedures as a whole, not by isolating a particular part of its total system."].)

In light of the requirements set forth by *Morrissey*, *Vickers*, their progeny, and sections 1203.2 and 3000.08, which set forth a fair and reliable process, there is little value added by more narrowly requiring a separate probable cause hearing to be held within 15 days of arrest, as appellant proposes. If a revocation hearing is already being held locally and promptly such that information is fresh and evidence is available, at which the parolee is represented by counsel, then requiring an additional hearing to be held within 15 days simply to make a probable cause determination is of very little value. This is especially true when multiple probable cause determinations have already been made by law enforcement, parole, or judicial officers. Neither appellant nor the court in *Williams* have identified any value in requiring a separate probable cause hearing within 15 days when the relevant precedents described above are adhered to. (See

also *Valdivia v. Schwarzenegger* (9th Cir. 2010) 599 F.3d 984, 995, *cert. denied sub nom. Brown v. Valdivia* (2011) 131 S.Ct. 1626 [vacating a district court order denying a motion to modify the injunction to conform to recently enacted section 3044 because "[t]here is no indication anywhere in the record that these particular procedures are necessary for the assurance of the due process rights of parolees"].)

The third factor is the government's interest, including the function of the parole revocation process and the fiscal and administrative burdens that the additional procedural requirements proposed by appellant would entail. (*Mathews, supra*, 424 U.S. at p. 335.) As always, the government has an interest in the orderly and expeditious functioning of the courts, including conducting timely probation and parole revocation proceedings. (See *People v. Ortiz* (1990) 51 Cal.3d 975, 983-984.) The government has an interest in maintaining extensive restrictions on an individual's liberty after that person has been found guilty of a crime, both while imprisoned during his sentence and while on parole after the term of imprisonment has been completed. (*Morrissey, supra*, 408 U.S. at p. 483.) The government's interest in reimprisoning a parolee for failing to abide by the conditions of his parole without a new adversary criminal trial is overwhelming. (*Ibid.*) Additionally, society has an interest in the possibility of restoring the parolee to a normal and useful life within the law. (*Id.* at p. 484.) Of course, the government has no interest in revoking parole without some informal procedural guarantees. (*Ibid.*) Society has an interest in treating parolees with basic fairness and ensuring that parole is not revoked based on erroneous information or an erroneous evaluation of the need to revoke parole so as to enhance the chance of rehabilitation by avoiding reactions to arbitrariness. (*Ibid.*) The parole revocation process required by *Morrissey* and *Vickers* and implemented by sections 1203.2 and 3000.08 is tailored in good faith to insure that parolees are given a meaningful opportunity to

present their case and prevent erroneous deprivations of liberty. (See *Mathews, supra*, 424 U.S. at pp. 348-349.)

The government's interest in conserving scarce fiscal and administrative resources must also be weighed. (*Mathews, supra*, 424 U.S. at p. 348.) At some point, the benefit of an additional procedural safeguard to the individual and society may be outweighed by its cost, particularly when the current process has identified the individual as someone likely to be found undeserving of additional protection. (*Ibid.*)

The fiscal and administrative burdens that would be imposed on the superior courts by requiring a separate probable cause hearing within 15 days of arrest are high. As respondent has explained, this additional requirement would force the superior courts to hold two hearings at or near the same time with virtually identical evidentiary content. It would be a redundant and inefficient use of scarce judicial and administrative resources. Even assuming there are some counties for which it would not be practically impossible, despite the additional cost and court availability required, to implement a dual hearing system in such a limited time frame in all cases, it is doubtful that all counties would be able to practically and effectively implement such a system, especially those that can afford to devote only one calendar per week to parole revocation proceedings. In some instances, the practical realities of the calendar would necessitate a separate probable cause hearing only nine days after arrest. That timeline hardly leaves sufficient time for DAPO to consider the appropriateness and potential effectiveness of intermediate sanctions, complete its internal review processes, and file a petition to revoke parole and then for the parties to adequately investigate the allegations prior to the probable cause hearing. Such a timeline is additionally problematic if subpoenas are required, given that service of subpoenas must allow witnesses a reasonable

time for preparation and travel, and notice in lieu of a subpoena generally must be served at least 10 days before the hearing (Code Civ. Proc. § 1987).

And as the Court of Appeal poignantly noted below, the superior courts were already overworked even before the 2011 Realignment Legislation, and the shift of parole revocation proceedings to the superior courts has only exacerbated the problem. (Slip opn. at p. 9; Judicial Council of California, Court Statistics Report (2015) pp. 54, 80, at http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf [as of June 6, 2016]; California Department of Corrections and Rehabilitation, California Prisoners and Parolees 2010 (2011) pp. 56-57, at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2010.pdf [as of June 6, 2016].) Counsel and witnesses would be similarly burdened by having to devote time and resources to two hearings in a short period of time when only one would suffice.

The *Mathews* three-factor balancing test does not require any parole revocation process other than the requirements set forth in *Morrissey*, which created a flexible framework to ensure a parolee arrested for an alleged violation of parole receives a prompt, if informal, probable cause determination and a final determination on the violation allegation within a reasonable time. *Mathews* and *Morrissey* do not require two separate hearings when the circumstances do not require it, and they also do not require a probable cause hearing to be held within 15 days of arrest. Rather, the probable cause determination need only occur "as promptly as convenient after arrest" while information pertaining to the violation is fresh and available.

D. *Morrissey*'s Due Process Requirements Were Not Met in This Case

The parole revocation proceedings that occurred in this case do not appear to have satisfied the due process requirements articulated in *Morrissey*. Appellant did not receive a hearing "as promptly as convenient after arrest" that satisfied all of the substantive constitutional requirements for a probable cause hearing.

The probable cause determination made by DAPO on August 26, 2013, does not appear to qualify as a *Morrissey*-compliant probable cause hearing. Although it appears that the determination was made by an independent officer, not the supervising parole agent, and that appellant was given written notice of the parole violations alleged, the record does not establish that appellant was given the opportunity to appear and speak on his own behalf, to present witnesses or evidence before the independent officer, or to question his parole agent who authored the probable cause determination form and parole violation report. (Supp. CT 6-7.)

The probable cause determination made by the Solano County Superior Court on September 6, 2013, also does not appear to meet the requirements of a *Morrissey*-compliant probable cause hearing. The judicial determination of probable cause was an ex parte proceeding for which appellant was not present. (CT 1, 4; 9/11/13 RT 7; 9/25/13 RT 4-5.) The record also does not reflect that appellant received any of the other protections required by *Morrissey* on that date.

Appellant did not in fact receive a probable cause hearing on September 11, 2013. It is unclear from the record whether appellant's case was set for a probable cause hearing or a final revocation hearing on September 11, 2013. (CT 5; 9/11/13 RT 4.) It appears that, had a proper probable cause hearing or unitary hearing been conducted on that day, that hearing would have satisfied *Morrissey*'s due process requirements.

However, appellant moved to dismiss the petition to revoke parole for a failure to hold a timely probable cause hearing and the court continued the matter to permit the parties to brief the issue. (9/11/13 RT 4-7.) Appellant urged the superior court to rule on the motion that day rather than order a continuance, so it appears he did not waive his right to a timely probable cause hearing. (9/11/13 RT 6.)

After the superior court ruled on appellant's motion to dismiss, a final revocation hearing was held on October 3, 2013, but it does not seem that it was sufficiently prompt to constitute a proper unitary hearing. As respondent has explained, *ante*, under relevant case law it appears that a delay of more than 30 days after arrest cannot be considered "as promptly as convenient after arrest." The final revocation hearing in this case was held 41 days after appellant's arrest, well outside the 30-day boundary. Therefore, respondent is constrained to agree that the proceedings in this case did not satisfy the constitutional requirements of *Morrissey*.

E. Appellant Was Not Prejudiced by Any Error

Appellant maintains that dismissal of the parole violation is required because he was prejudiced by the superior court's failure to hold a constitutionally-sufficient probable cause hearing. (AOB 31-36.) Regardless of any constitutional due process violation here, appellant did not suffer any prejudice from it because he received all the due process protections to which he was entitled at the final revocation hearing. Therefore, dismissal is not required.

The denial of a parolee's right to a timely probable cause hearing does not necessarily mean that he is automatically entitled to relief therefrom. (*In re La Croix*, *supra*, 12 Cal.3d at p. 154.) "Due process does not require that a parolee benefit from such a denial, but only that no unfairness result therefrom." (*Ibid.*) "[A] parolee whose parole has been revoked after a properly conducted revocation hearing is not entitled to have the revocation

not for the additional time necessary to fairly address appellant's motion to dismiss. (See *In re La Croix, supra*, 12 Cal.3d at p. 156 [reasonableness analysis requires a balancing of all relevant circumstances].) The Solano County Superior Court, a neutral and detached hearing body, conducted the hearing and made a record of the proceedings. (*People v. Moss* (1989) 213 Cal.App.3d 532, 534 [court reporter's transcript met the written statement requirement]; *People v. Scott* (1973) 34 Cal.App.3d 702, 707-708 [same]; see also *In re La Croix*, at p. 151 & fn. 1 [suggesting a readily available transcript would satisfy the written statement requirement]; accord *United States v. Yancey* (7th Cir. 1987) 827 F.2d 83, 89.) Appellant received all the other attendant due process protections such as notice, discovery, and opportunity to confront the evidence against him and to present evidence on his own behalf. Appellant was present and represented by counsel at the revocation hearing. (See *Vickers, supra*, 8 Cal.3d at pp. 461-462.) Appellant cross-examined the witnesses who testified against him and chose not to present any evidence on his own behalf. Nothing about the revocation hearing was unfair.

The superior court properly concluded at the revocation hearing that appellant violated his parole by possessing pornography and material that depicts children in undergarments. Thus, it necessarily found probable cause to support the allegations and would have reached the same conclusion at a probable cause hearing.

Appellant claims that he was prejudiced in several ways by the denial of a constitutionally-sufficient probable cause hearing, but he makes no factual showing that he was actually prejudiced.[17] He complains about the

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[17] Appellant's arguments regarding what counsel would have been able to do at a probable cause hearing are unhelpful to him because the (continued...)

delay in the appointment of counsel (AOB 32-33), but counsel had sufficient time to prepare for the final revocation hearing. Appellant has not shown that counsel's representation would have been different at the final revocation hearing had counsel received the case more than approximately 24 days in advance of the hearing.[18] For instance, appellant has not shown what witnesses disappeared, what evidence was lost, or what events were forgotten in the days prior to counsel's appointment, nor that those things, even if they could be shown to have occurred, would not have occurred had he received a constitutionally-sufficient probable cause hearing. Because the evidence of the violation consisted of videos and photographs found on appellant's phone, and the revocation hearing occurred within a reasonable time, it is not readily apparent what defense witnesses or evidence might have become unavailable, and how their alleged availability would have had a bearing on the court's final determination that appellant committed the violations. Nothing in the record indicates that additional time with the case would have resulted in counsel presenting different or additional arguments at the final revocation hearing.

Moreover, the various strategies appellant now proposes could have been argued by counsel (AOB 34) are meritless. (*In re La Croix, supra*, 12 Cal.3d at p. 155 [defendant failed to show that he could have *successfully* challenged the violation or that all factual issues that could have been raised would not necessarily have been resolved against him].) It strains credulity

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(...continued)
prejudice analysis here focuses on what occurred at the final revocation hearing.

[18] Counsel stated at the September 11 hearing that he generally receives the case file "a couple of days prior" to the first court date. (9/11/13 RT 5.) He did not specifically state when he received appellant's case file.

to suggest that the videos and photographs appellant possessed on his cell phone did not constitute a violation of the prohibition against viewing, possessing, or having access to "any material" depicting adults or children in undergarments. (Supp. CT 24.) It is equally unlikely that an argument that appellant did not have knowledge of the videos and photographs on a phone he admitted was his would have been successful. The reason these arguments were not presented at the final revocation hearing was not that counsel did not have time to investigate them but that they were meritless.

Appellant also mentions "some difficulty about notice" related to the charges (AOB 34-35), but the only issue pertaining to notice of the violations that counsel raised at the final revocation hearing was whether possession of a mobile phone, which was not alleged in the petition but was raised by the prosecutor at the revocation hearing, should have been alleged as a separate violation. (10/3/13 RT 4-6.) The court found that appellant, having received notice of the third violation allegation regarding his use of a computer or mobile phone to view explicit sexual material on a website, received sufficient notice of the mobile phone possession violation (10/3/13 RT 6), and appellant does not contend that this finding was erroneous. Moreover, the court did not find that possession of a phone was a violation. The violations the court found related to possession of material that was found within the phone rather than possession of the phone itself. (10/3/13 RT 35-37.) Thus, there is no basis to find inadequate notice in connection with the revocation hearing.

Appellant complains of problems related to the admissibility of certain documents presented at the revocation hearing, but the majority (if not all) of what appellant terms "problems" pertained to hearsay objections to the evidence showing that appellant was on parole and the conditions of his parole. These are straightforward foundational issues that would not

have been affected by any delay or failure to conduct a constitutionally-sufficient probable cause hearing.

All of the concerns appellant raises are generally present in any case in which a timely probable cause hearing is not held. Appellant's argument—under which essentially every case involving a failure to hold a timely probable cause hearing would result in prejudice despite a properly conducted final revocation hearing—resembles the one that was soundly rejected by this Court in *In re La Croix, supra*, 12 Cal.3d at p. 155. Indeed, the same general concerns were similarly applicable in numerous past cases which nevertheless found no prejudice. (*Id.* at pp. 154-155 [parole revocation]; *In re Coughlin, supra*, 16 Cal.3d at p. 61 [probation revocation]; *In re Winn, supra,* 13 Cal.3d at pp. 698-699 [parole revocation]; *People v. Woodall, supra,* 216 Cal.App.4th at p. 1238 [probation revocation].)

Additionally, there is no evidence that DAPO, the Solano County District Attorney's Office,[19] and the Solano County Superior Court are not making a good faith effort to comply with the mandates of *Morrissey* and its progeny. (AOB 35-36; *In re La Croix, supra*, 12 Cal.3d at p. 154.) The "severe sanction" of dismissal will be imposed only on a showing that the party in control of the revocation proceedings is "unresponsive to mandates of *Morrissey* and its progeny and must be coerced to comply therewith." (*Id.* at p. 155.) There is no such showing of bad faith or unresponsiveness such that dismissal is necessary to coerce compliance here. The parties

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[19] It is unclear how the Solano County District Attorney's Office could be considered "unresponsive" to *Morrissey*, *Vickers*, and their progeny, as suggested by appellant (AOB 36), so as to justify dismissal when it did not file the petition for revocation of parole and had no control over the setting of a probable cause hearing, which was under the authority of the court.

reasonably understood the law to be at least somewhat unclear as to what specific procedures were required for post-Realignment parole revocations. (See 9/11/13 RT 5; 9/25/13 RT 5-10.) The superior court clearly made a good faith attempt to satisfy the due process concerns articulated in *Morrissey*, *Vickers*, and their progeny when it held that the judicial probable cause determination was reasonable under those precedents. (9/25/13 RT 8-9.) They certainly did not "intentionally withhold [a] hearing[]" to which appellant was entitled. (*Id.* at p. 155 & fn. 7 [parole authority relied and acted in good faith on its misinterpretation of *Morrissey*].) Thus, because all of the parties involved, including the court, made a good faith effort to comply with the relevant precedents, dismissal is not required.

Appellant has not shown any prejudice from any failure to conduct a constitutionally-sufficient probable cause hearing. His parole was revoked after a properly conducted revocation hearing. Therefore, he is not entitled to have the revocation set aside.

CONCLUSION

Accordingly, respondent respectfully requests this Court to affirm the judgment.

Dated: June 14, 2016

Respectfully submitted,

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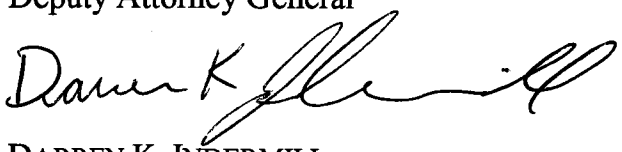

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SA2016100690

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 11,816 words.

Dated: June 14, 2016

KAMALA D. HARRIS
Attorney General of California

DARREN K. INDERMILL
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. DeLeon** No.: **S230906**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 15, 2016, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 15, 2016, at Sacramento, California.

Laurie Lozano
Declarant

Signature

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