SUPREME COURT
FILED
AUG - 4 2016
Frank A. McGuire Clerk
Deputy

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 REPLY BRIEF ON THE MERITS

Roberta Simon
Attorney at Law
State Bar No. 139807
Post Office Box 10728
Oakland, CA 94610
(510) 763-7226
rsarasimon@hotmail.com

Attorney for Appellant
By Appointment of the
Supreme Court of California

TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUE 1

INTRODUCTION. 1

ARGUMENT 2

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. 2

A. Governing Parole Revocation Statutes Require A Preliminary Probable Cause Hearing. 2

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* 4

1. Respondent Concedes That *Morrissey* Applies 4

2. Respondent Wrongly Contends A Unitary Hearing Would Satisfy Due Process 4

a. Respondent's Reading Of *Morrissey* Is Wrong 4

b. Respondent's Legal Authority Does Not Support Their Proposition 7

c . Other Jurisdictions And the *Valdivia* Litigation 12

d. Practical Problems Caused By A Unitary Hearing 15

3. The Probable Cause Hearing Should Be Held Within 15 Days Of A Parolee's Arrest 17

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 21

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 27

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 30

CONCLUSION. 33

TABLE OF AUTHORITIES

Page

Cases

Cafeteria & Restaurant Workers Union v. McElroy (1961) 367 U.S. 886 — 22

Chapman v. California (1967) 386 U.S. 18 — 31, 32

Ellis v. District of Columbia (D.C. Cir. 1996) 84 F.3d 1413 — 13

Gagnon v. Scarpelli (1973) 411 U.S. 778 — 10, 21

*Goldberg v. Kelly (*1970) 397 U.S. 254 — 20

In re Anderson (1977) 73 Cal.App.3d 38 — 28

In re Bye (1974) 12 Cal.3d 96 — 28

In re Hudson (2006) 143 Cal.App.4th 1 — 25

In re La Croix (1974) 12 Cal.3d 146 — 7, 8, 30, 31, 32

In re Law (1973) 10 Cal.3d 21 — 8

In re Smith (2008) 42 Cal.4th 1251 — 3, 20

Mathews v. Eldridge (1976) 424 U.S. 319 — 21, 22, 24, 25, 27

Moody v. Daggett (1976) 429 U.S. 78 — 7

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

People v. Buena Vista Mines (1996) 48 Cal.App.4th 1030 — 30

People v. Buford (1974) 42 Cal.App.3d 975 — 28

People v. Byron (2016) 246 Cal.App.4th 1009 review denied July 13, 2016 30

People v. Clytus (2012) 209 Cal.App.4th 1001 12

People v. Coleman (1975) 13 Cal.3d 867 27

People v. Garcia (1984) 36 Cal.3d 539 21

People v. Guerra (1984) 37 Cal.3d 385 20, 21

People v. Lowery (2011) 52 Cal.4th 419 3

People v. Pieters (1991) 52 Cal.3d 894 3

People v. Vickers (1972) 8 Cal.3d 451 7, 27

People v. Woodall (2013) 216 Cal.App.4th 1221 28

Pierre v. Washington State Bd. Of Prison Terms & Paroles (9th Cir. 1983) 699 F.2d 471 13

Raven v. Deukmejian (1990) 52 Cal.3d 336 15

Richardson v. New York State Bd. Of Parole (N.Y. App.Div. 1973) 341 N.Y.S.2d 825 12

Roe v. Haskins (6th Cir. 1968) 388 F.2d 91 26

Valdivia v. Brown (E.D. Cal. 2012, No. CIV S-94-671 LKK/GGH) 2012 U.S. Dist. Lexis 8092 14, 15

Valdivia v. Brown (E.D. Cal. 2013) 956 F.Supp.2d 1125 14, 15

Valdivia v. Davis (E.D. 2002) 206 F.Supp.2d 1068 14, 15

Valdivia v. Schwarzenegger (9th Cir. 2010) 599 F.3d 894, cert. denied sub nom. *Brown v. Valdivia* (2011) 131 S.Ct. 1626 15

Williams v. Superior Court (2014) 230 Cal.App.4th 636 — passim

Constitutions

U.S. Const.	Amend. XIV	passim

Statutes

Health & Saf. Code	§ 11590	25
Penal Code	§ 290	25
	§ 457.1	25
	§ 1203.2	2, 17, 28, 29
	§ 3000.08	10, 17
	§ 3003	25
	§ 3044	2, 3, 17, 28

Other Authorities

Administrative Office of the Courts, Parole Revocation Proceedings: FAQs, June 26, 2013 — 11, 12

Hopper et al., *Shifting the Paradigm or Shifting the Problem? The Politics of California's Criminal Justice Realignment* (2014) 54 Santa Clara L. Rev. 529 — 19, 23

IN THE SUPREME COURT OF OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY 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

This reply brief on the merits is designed to reply to the Attorney General's contentions which require further discussion for proper determination of the issue raised. This brief does not respond to contentions that appellant believes were adequately discussed in the opening brief on the merits, and appellant intends no waiver of these by not expressly reiterating them herein.

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

Appellant maintains that the 15-day time frame for holding a timely preliminary probable cause hearing found in Penal Code[1] section 3044, subdivision (a)(1), applies to the current statutory framework for judicial parole revocation proceedings. (AOB 10-12.) Respondent concedes that *Morrissey v. Brewer, supra,* 408 U.S. 471 and its progeny govern the constitutional requirements for the process due parolees, including the timely probable cause hearing requirement at revocation proceedings conducted by the superior court pursuant to section 1203.2. (RB 5.) Respondent further acknowledges that the Legislature has expressed this intent for *Morrissey* and its progeny to apply to judicial parole revocation proceedings. (RB 12.) Nevertheless, Respondent contends the shift from administrative parole revocation proceedings to judicial parole revocation proceedings nullified the statutory requirement that a probable cause hearing must be held no later than 15 days after arrest on an alleged parole violation. Respondent is mistaken.

Williams v. Superior Court (2014) 230 Cal.App.4th 636 provides a well-reasoned statutory analysis demonstrating that section 3044's mandate of a probable cause hearing

1 All future statutory references are to the California Penal Code unless otherwise indicated.

within 15 days of a parolee's arrest still applies, even though such proceedings are no longer before the Parole Board. (*Id.* at 657-659.) That analysis has been set forth in appellant's opening brief. (AOB 8-12.) Respondent's argument that section 3044 is not applicable to parole revocation proceedings conducted by the superior courts pursuant to section 1203.2 (RB 22) is not well-reasoned. In view of Respondent's concessions that *Morrissey* continues to apply to proceedings conducted in the superior courts, it is not clear why section 3044 should not also continue to apply to parole revocation proceedings in the courts.

Further, courts must construe a statute with a view to promoting rather than defeating the policy and purpose behind it. (*People v. Pieters* (1991) 52 Cal.3d 894, 898.) This Court has held that, insofar as practicable, it will construe a statute so as to render it valid or free from doubt as to its constitutionality (*People v. Lowery* (2011) 52 Cal.4th 419, 427), and that, when reasonable, it will construe a statute to avoid difficult constitutional questions. (*In re Smith* (2008) 42 Cal.4th 1251, 1269.)

Respondent notes that "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." (RB 24.) Respondent misses appellant's point, which is that the Legislature has already said what constitutes due process. The Legislature, which is well-placed to make this assessment, has resolved this issue.

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*

1. Respondent Concedes That *Morrissey* Applies

Even if this Court were to conclude that the governing parole revocation [illegible] mandate a preliminary probable cause hearing within 15 days, federal [illegible] principles of procedural due process do.

[illegible] forth in the opening brief, the United States Supreme Court determined in [illegible] the Constitution requires a two stage process in parole revocation [illegible] (*Morrissey, v. Brewer, supra,* 408 U.S. at 485; AOB 13-20.) Respondent [illegible] "due process as articulated in *Morrissey* requires some sort of probable [illegible] after a parolee's arrest for an alleged violation of parole prior to revoking [illegible] violation." (RB 10.) Respondent further concedes that *Morrissey* continues [illegible] though parole revocation proceedings are now judicial rather than [illegible] proceedings. (RB 11.) According to Respondent, "*Morrissey*'s [illegible] should apply to the parole revocation proceedings in this case." (RB 12-13.)

2. Respondent Wrongly Contends A Unitary Hearing Would Satisfy Due Process

a. Respondent's Reading of *Morrissey* is Wrong

Respondent contends that a unitary hearing may satisfy due process in the [illegible] context. (RB 14.) Respondent is incorrect. Appellant disagrees with Respondent [illegible] allows a probable cause hearing to be unified with a final revocation

hearing. (*Morrissey v. Brewer, supra,* 408 U.S. at 485; RB 6.) Appellant further disagrees with Respondent that "the constitutional requirements concerning the nature and timeliness of the probable cause hearing do not require such a rigid procedural structure as set forth in *Williams v. Superior Court* (2014) 23 Cal.App.4th 636." (RB 10-11.) *Williams* does not provide a rigid procedural structure. Rather, what *Williams* provides is necessary for due process. That will be discussed below in Subsection B-3.

Respondent seems to be saying that *Morrissey* does not require two separate hearings. That is incorrect. Two important stages are contemplated by *Morrissey.* The two stages are not the same. There are two distinct and necessary determinations to be made at the probable cause and final revocation hearings. The first obviously requires a finding of probable cause, and there are benefits in having a limited right to cross-examination at a probable cause hearing as allowed by *Morrissey.* The second requires a determination by the state that an individual is no longer suited to remain in society. (*Morrissey v. Brewer, supra,* 408 U.S. at 485-487.)

Respondent's reading of *Morrissey* is wrong. *Morrissey* allows for flexible procedures up to a point, but demands some basics. While *Morrissey* did not elevate form over substance, and laid down a general framework, it nonetheless was firm about the two levels of inquiry. "We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any State's parole system." (*Morrissey v. Brewer, supra,* 408 U.S. at 490.) *Morrissey* is saying that the "few

basic requirements" it sets out, including a probable cause hearing, should be followed.

That parole revocation hearings no longer occur "at locations remote from the place of arrest" (RB 11) is not enough of a reason to make changes. *Morrissey* says it may be that the parolee is arrested at a place distant from the state institution. (*Id.* at 485.) *Morrissey* only says that is possible. *Morrissey* also says that a substantial lag is likely to occur between arrest and the final revocation hearing. (*Ibid.*) And those are not the only reasons a separate probable cause hearing within 15 days is required.

Respondent states, "The informal and flexible procedures articulated in *Morrissey* permit the use of a unitary hearing procedure to satisfy due process." (RB 14.) There is no legal citation after that sentence. That statement is incorrect, and Respondent's logic leading up to making that conclusion is skewed.

Appellant disputes Respondent's deduction that, "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 490; RB 15.) What *Morrissey* actually says is, "Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation when the revocation is based on a conviction of another crime." (*Id.* at 490.)

Respondent says that a "prompt unitary hearing meets the rationales behind the probable cause hearing requirement." (RB 18.) Respondent cites no legal authority for that proposition. Respondent then tries to show that a "prompt unitary hearing under California's current parole revocation scheme adequately addresses *Morrissey*'s due

process concerns." (RB 18.) Again, there is no specific citation to legal authority. Respondent is incorrect that two separate hearings would "essentially mirror each other" (RB 19) - the two determinations are completely different and are mandated as separate stages by *Morrissey.*

b. Respondent's Legal Authority Does Not Support Their Proposition

Respondent argues that *"Morrissey* does not foreclose a summary resolution if an undisputed course of conduct constitutes a parole violation as when the parolee has already suffered a criminal conviction based on that conduct. . . . " (RB 15.) Respondent continues, "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." (RB 15.) Respondent gives no citations to *Morrissey* to support those statements. Respondent cites to *People v. Vickers* (1972) 8 Cal.3d 451 (RB 15), which is a probation case and distinguishable. Probation revocation cases are discussed in Subsection D below.

Respondent also cites *Moody v. Daggett* (1976) 429 U.S. 78 and *In re La Croix* (1974) 12 Cal.3d 146. (RB 15.) Respondent does not elaborate on why there was a unitary proceeding in *Moody;* that case does not help him. In *Moody,* the United States Supreme Court stated that the petitioner had already been convicted of and incarcerated on a subsequent offense, so there was no need for the probable cause hearing which *Morrissey* required for a parole violation. That was because, said the court, the subsequent conviction obviously gave the parole authority probable cause to believe the parolee had

committed acts which would constitute a violation of parole conditions, and because issuance of the warrant did not immediately deprive him of liberty. (*Id.* at 86, fn. 7.)

Nor does *La Croix* help Respondent. In *La Croix,* this Court noted that the petitioner, an alleged parole violator, was entitled to a timely prerevocation hearing which conforms to *Morrissey* standards, although his alleged misconduct was also independently charged as a new crime. (*Id.* at 150.) La Croix did not receive an independent hearing of collateral criminal proceedings involving the same course of alleged misconduct. (*Ibid.*) The procedures afforded through the holding of a preliminary hearing "are inclusive of or may be made to conform to the proceedings mandated in *Morrissey.*" (*La Croix, supra,* 12 Cal.3d at 151.) Notice of the dual purpose of the hearing is required. There was no such notice in *La Croix,* and no determination of probable cause was made, so La Croix was entitled to a prerevocation hearing. (*Id.* at 153.) *La Croix* did not reach the question of whether a unitary hearing satsified due process. *(Id.* at 153, fn. 3.) Respondent has pointed to exceptions wherein a parolee with a criminal conviction arising out of the parole violation can have his need for a probable cause hearing met with a preliminary hearing on the new offense.

Respondent says, "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." (RB 15.) Again, probation is distinguishable. The other authorities Respondent refers to, discussed below, are not persuasive.

Citing *In re Law* (1973) 10 Cal.3d 21, Respondent states, "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." (RB 15.) Respondent also cites *Law* for the proposition that a unitary hearing procedure promotes judicial efficiency and prevents redundancy that would needlessly overburden the courts and the parties. (RB 16.) Respondent's use of *Law* is unavailing. *Law,* which held there was no bail for a parole violation, considered alleged parole violations which are also charged as independent felonies. *Law* stated, "It is thus manifest that where the conduct which constitutes a prima facie violation of parole is also independently charged as a new felony the procedures afforded through the holding of a preliminary hearing are inclusive of or may be made to conform to the procedures mandated in *Morrissey."* (*In re Law, supra*, at 27.) In such instances, there is no purpose in determining probable cause of a violation of parole independent of a prior determination of existing probable cause of commission of a felony grounded in the same occurrence. *Law* emphasized that due process would further require that a parolee have fair notice of the nature and effect of a hearing intended to serve such a dual purpose. *Law* also noted that the Parole Authority could conduct a separate probable cause hearing notwithstanding a preliminary hearing on the newly charged felony. The upshot was that use of a preliminary hearing in appropriate cases would eliminate needless duplication. (*Ibid.*)

Respondent cites *Williams v. Superior Court, supra,* 230 Cal.App.4th at 655-656, saying that *Williams* concluded that a proper unitary hearing might satisfy due process.

(RB at 16.) Williams did not object to a unitary hearing. (*Ibid.*) The Court of Appeal stated, "Thus, *Morrissey*-compliant probable cause hearings are required in post-realignment California, although a prompt unitary hearing may suffice." However, *Williams* immediately says in parentheses, "But see *Gagnon, supra,* 411 U.S. at pp. 781-782 [two separate hearings are required]." *Williams* continues, "A *Morrissey*-compliant probable cause hearing requires that the parolee be given the opportunity to 'appear and speak in his own behalf; he may bring letters, documents, or' witnesses, and may question any person 'who has given adverse information on which parole revocation is based . . . . ' (*Morrissey, supra,* 408 U.S. at p. 487.) In our view, this would include the opportunity to present evidence of Parole's failure to comply with section 3000.08, subdivision (f), which requires parole agents to emply 'assessment processes' to determine whether intermediate sanctions are appropriate before petitioning for parole revocation." (*Id.* at 656.) Thus, *Williams* militates against having a "prompt unitary hearing," and comes down squarely in favor of a separate and timely evidentiary probable cause hearing.

Appellant reaffirms his analysis of *Gagnon v. Scarpelli* (1973) 411 U.S. 778, as set forth in the opening brief, saying that two separate hearings are required. (AOB 19-20.) Respondent cannot show that *Gagnon* does not require two hearings. (RB 20.) Subsequent California decisions approving of a unitary hearing procedure do not undermine *Gagnon*'s fundamental rule, as Respondent alleges. (RB 20.) Such cases, unnamed at this point by Respondent, may be probation revocation cases, or the alleged parole violation may also be charged as a new offense.

Thus Respondent points to exceptions in which a parolee gets a preliminary hearing with the due process protections of criminal procedure. Perhaps the parolee is already convicted of another offense or he is charged independently with a new offense. Another exception may occur when a parole violation is charged after a criminal conviction and in part because of such conviction, the factual issues resolved in the criminal proceedings are foreclosed and the parolee cannot relitigate them. (*Morrissey v. Brewer, supra,* 408 U.S. at 490.) The exceptions should not be made to swallow the rule, which is that due process requires a probable cause hearing within 15 days of a parolee's arrest for an alleged parole violation.

Respondent concludes that "a prompt unitary hearing procedure fully satisfies the due process requirements enunciated in *Morrissey.*" (RB 19.) That is incorrect and, as demonstrated above, has been reached by faulty logic. Further, the final revocation hearing need not be "prompt"; it can be within 45 days of the parolee's arrest. As *Morrissey* says, "There is typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked." (*Id.* at 485.) A unitary hearing procedure as advocated by Respondent (RB 20) would not meet the requirements of *Morrissey.*

Respondent states that the Administrative Office of the Courts, in a publication intended to address frequently asked questions regarding post-Realignment parole revocation proceedings, has declared that a unitary hearing procedure is proper in appropriate parole revocation cases. (RB 17, citing to Administrative Office of the Courts,

Parole Revocation Proceedings: FAQs, June 26, 2013, pp. 5-6.) This document, prepared by attorneys and judges, contains a disclaimer that it is for informational purposes only, and responses are not to be construed as legal opinion or advice. This document has also been cited in a previously published opinion – including the disclaimer about it not being legal advice – to demonstrate how unsettled a particular Realignment question was. (*People v. Clytus* (2012) 209 Cal.App.4th 1001, 1005.) It is not of great persuasive value.

As demonstrated above, it does not follow that, as Respondent states, "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.*" (RB 16.) There is no legal citation after that sentence. Respondent's argument does not withstand scrutiny.

c. Other Jurisdictions And the *Valdivia* Litigation

Citing to three old cases from a very small minority of jurisdictions, Respondent claims, "Other jurisdictions have also determined that a prompt unitary hearing procedure satisfies *Morrissey*'s due process requirements." (RB 18.) Appellant addresses Respondent's three cases below.

In *Richardson v. New York State Bd. Of Parole* (N.Y. App.Div. 1973) 341 N.Y.S.2d 825, the court held that none of a parolee's rights had been violated when, without a preliminary hearing, parole was revoked at a hearing held only 19 days after the arrest. The court noted that the need for a *Morrissey* preliminary hearing may be "obviated if the Board proceeds immediately upon a final revocation hearing." (*Id.* at 827.)

In *Pierre v. Washington State Bd. Of Prison Terms & Paroles* (9th Cir. 1983) 699 F.2d 471, the appellant's parole had been suspended and he had an informal administrative review shortly thereafter, which did not rise to the level of a preliminary hearing. He then had a formal parole revocation hearing. Since that hearing was held only 21 days after appellant's parole was suspended, it was prompt enough to qualify as the preliminary probable cause determination required by *Morrissey.* Under its facts, which the court distinguished from those of *Morrissey,* Pierre was not denied his right to a prompt probable cause determination. (*Id.* at 473.)

In *Ellis v. District of Columbia* (D.C. Cir. 1996) 84 F.3d 1413, 1424, the court noted that parole violators in the District of Columbia are taken into custody for parole violations only after the Board of Parole or a member thereof issues a parole violator warrant based on a determination of probable cause to believe the parolee committed a new offense or violated a condition of parole. The Board thus made a probable cause determination before the arrest, functioning as does a magistrate in deciding whether to issue an arrest warrant. The court nonetheless expressed hesitation in pronouncing the District's pre-revocation hearing procedures constitutionally sufficient. (*Id.* at 1424.)

These are not strongly persuasive cases for California. Further, Respondent does not indicate whether these jurisdictions have changed their methods of parole revocation since the cases were issued. And Respondent cites no statistics that a unitary hearing, if it still obtains in those other jurisdictions, actually works or saves money.

California's recent *Valdivia* litigation may be looked to for guidance. There, plaintiffs challenged the constitutionality of California's then-existing parole revocation system in a class action lawsuit in federal district court. (*Valdivia v. Davis* (E.D. 2002) 206 F.Supp.2d 1068, 1069.) The then-existing system did not provide for probable cause hearings. (*Id.* at 1070.) The district court held that the California parole revocation system violated the plaintiffs' due process rights. (*Id.* at 1078.) Specifically, it held that California's system of allowing a 45-day delay before a probable cause hearing was unconstitutional. (*Ibid.*) The court noted that *Morrissey*'s "explanation of the requirements for a preliminary procedure plainly suggests that it contemplated a 'hearing' rather than some ex-parte process, for confiming probable cause." (*Id.* at 1075.)

The state agreed to a permanent injunction in 2004. The court ordered, inter alia, that probable cause hearings must be held not later than 10 business days after parolees were served notice of charges and rights. (*Valdivia v. Brown* (E.D. Cal. 2013) 956 F.Supp.2d 1125, 1128.) After Proposition 9, Victims' Bill of Rights Act of 2008: Marsy's Law, enacted section 3044, the *Valdivia* plaintiffs moved to enjoin enforcement of parts of that section which conflicted with the Injunction. (*Valdivia v. Brown, supra,* 956 F.Supp.2d at 1129.) In *Valdivia v. Brown* (E.D. Cal. 2012, No. CIV S-94-671 LKK/GGH) 2012 U.S. Dist. Lexis 8092, the district court ruled that certain aspects of section 3044 were unconstitutional, including the statute's requirement that probable cause hearings be held within 15 days after the parolee's arrest, with an evidentiary revocation hearing within 45 days. The court's constitutional criticism of section 3044 was not based on the time

limits per se, but on the lack of other constitutionally mandated requirements. (*Id.* at 19.) Following the enactment of Realignment, the federal district court lifted the injunction and dismissed the case as moot. (*Valdivia v. Brown, supra,* 956 F.Supp.2d at 1126-1227.)

Respondent notes that *Valdivia v. Schwarzenegger* (9th Cir. 2010) 599 F.3d 894, 995, cert. denied sub nom. *Brown v. Valdivia* (2011) 131 S.Ct. 1626 says there was no indication these particular procedures were necessary to assure due process rights of parolees. (RB 31-32.) It bears emphasis that the litigation in the lower federal court resulted in a requirement of a prompt preliminary probable cause hearing, and that court ultimately warned against returning to the type of probable cause determination it found unconstitutional. (*Valdivia v. Brown, supra,* 956 F.Supp.2d at 1137; see *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352 ["Decisions of the lower federal courts interpreting federal law, though persuasive, are not binding on state courts"].)

d. Practical Problems Caused By A Unitary Hearing

Respondent states that the unitary hearing must be "prompt," and concedes that "prompt" means less than 30 days after arrest. (RB 18.) Even if *Morrissey* allowed for a unitary proceeding, which appellant disputes, since Respondent concedes the probable cause determination must be "prompt," then the parties would have to prepare for both determinations at once, much earlier than for a final hearing. If the prosecution is having trouble meeting the time frame and standards for a probable cause hearing now, how are they going to prepare for the probable cause determination and the final revocation hearing all rolled into one promptly? It would appear to be an

insurmountable burden. The prosecution now has 45 days in which to do a final revocation hearing. That must only be done for the violations which have passed the probable cause determination at the first hearing. Under Respondent's suggestion, if the unitary proceeding is held promptly, it will be difficult to provide a full review of the factual allegations surrounding the violation that is necessary for a final revocation hearing so promptly. The prosecution will have to gather all the evidence necessary to prove a violation in a short period of time. And that will have to be done for all alleged parole violations, not just the ones that have passed the probable cause determination. The violation could be merely technical or a non-reporting. Justice Douglas noted in *Morrissey* that parole is commonly revoked on mere suspicion that the parolee may have committed a crime. The parolee should, in the concept of fairness implicit in due process, have a chance to explain. Instead, under Iowa's rule, revocation proceeded on the "ipse dixit" of the parole agent, and, on his word alone, each of the petitioners had already served three additional years in prison. (*Morrissey v. Brewer, supra,* 408 U.S. at 495-496 (dis. opn. of Douglas, J.).)

What Respondent suggests is complicated and inefficient. It would prove difficult to oversee and review. Due process requires an early and separate probable cause hearing. The separate purpose mandated by *Morrissey* must be met. There should be a standard rule; an exception, as when a parole violation is also charged as a new felony, can be addressed if it arises.

3. The Probable Cause Hearing Should Be Held Within 15 Days Of A Parolee's Arrest

Respondent states, "Temporally, due process requires only that the probable cause hearing occur 'as promptly as convenient' after the parolee's arrest." (RB 21.) This is too loose a standard. Respondent's references to "timeliness standards governed by considerations of reasonableness based on the individual circumstances in each case" (RB 21) are vague. Respondent goes on to say that sections 1203.2 and 3000.08 "allow counties to implement a unitary hearing procedure and do not require them to adhere to a any strict timeline in the parole revocation process." (RB 21.) As discussed in the opening brief and above, section 3044 and *Williams v. Superior Court, supra,* 230 Cal.App.4th 636 provide that a parolee is entitled to a probable cause hearing no later than 15 days following his arrest for violation of parole. Respondent asserts, "*Williams'* holding runs contrary to the governing principles of reasonableness on a case-by-case basis." (RB 21-22.) However, *Morrissey* did not conceive of timeliness being assessed on a case-by-case basis.

Respondent argues that *Williams* should not be generally applied because its holding was the result of the court's conclusion "that the due process rights of parolees are being systematically violated in Orange County." (RB 24.) Respondent contends that *Williams* should not be expanded to mandate such specific requirements for every county. (RB 24-27.) Instead, Respondent suggests "[p]ermitting counties to adopt a proper unitary hearing procedure as the practical circumstances in each county may dictate. . . . " (RB 20.)

Respondent contends that when enacting Realignment, the Legislature "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." (RB 27.) Respondent cites no legal authority for that proposition. Respondent's suggestions would not meet *Morrissey*'s requirements or satisfy due process.

The fact that *Williams* arose out of a systematic violation of parolees' due process rights in Orange County should not deter its application, as Respondent suggests. (RB 24.) *Williams* is based on sound reasoning as to what due process requires. *Williams* limited its relief to "establishing certain outer time limits, beyond which the due process rights of parolees would be violated. We take this cautious approach because . . . we have not been provided sufficient information to craft a more precise solution." (*Id.* at 654.) Indeed, *Morrissey* arose out of such a fact situation. In *Morrissey,* the 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. They complained about the system of parole revocation in Iowa. (*Morrissey v. Brewer, supra,* 408 U.S. at 471-476.) As stated, "Petitioners assert here that only one of the 540 revocations ordered most recently by the Iowa Parole Board was reversed after hearing [citation], suggesting that the hearing may not objectively evaluate the revocation decision." (*Id.* at 476, fn. 1.)

Certainly *Morrissey* did not conceive of timeliness being assessed on a county-by-county basis. *Morrissey* spoke in terms of states creating procedures (not counties). As stated, "[w]e cannot write a code of procedures; that is the responsibility of each State.

Most States have done so by legislation, others by judicial decision usually on due process grounds. Our task is limited to deciding the minimum requirements of due process." (*Morrissey v. Brewer, supra,* 408 U.S. at 488-489, fn omitted.) It is up to the state, not the county, to make such policy.

Of course, each county has been dealing with the practicalities of Realignment for several years now. But that does not detract from the necessity of a uniform due process threshold for the entire state. Allowing each county to determine its own standard of due process would create difficulties in reviewing separate procedures on appeal, and might lead to equal protection violations.

Some critics of Realignment have emphasized the importance of state oversight of counties. "For Realignment to succeed, the state must more effectively oversee county Realignment programs and incentivize counties to implement Realignment in a manner consistent with the legislative intent and objectives underlying the legislation. Because counties have largely been allowed to make their own decisions about whether to embrace Realignment's evidence-based approach and alternatives to incarceration, many counties continue to rely upon incarceration as the primary response to low-level, non-violent crime." (Hopper et al., *Shifting the Paradigm or Shifting the Problem? The Politics of California's Criminal Justice Realignment* (2014) 54 Santa Clara L. Rev. 529, 558.)

The due process requirement that a probable cause hearing take place within a certain period must be written into law. What Respondent advocates are due process rights so flexible as to have none. If no rules are set and things are left to be done county by

county, it would make for a chaotic system, with parolees' rights arbitrarily determined. It should not be left to one county to have a certain level of due process and another county to wait for months. People in some counties might be held unlawfully. That is an indefensible position. The system weighs in favor of a uniform rule for due process. This Court should adopt the uniform rule proposed by appellant to avoid difficult constitutional questions. (See *In re Smith, supra,* 42 Cal.4th at 1255 [this Court construed the Sexually Violent Predators Act in a manner to avoid an equal protection problem].)

Since *Goldberg v. Kelly (*1970) 397 U.S. 254, the United States Supreme Court has determined what procedures due process requires when an individual is threatened with a loss of liberty or property. *Morrissey* provides the safeguard for due process for alleged parole violators. There is no reason to apply the changes Respondent advocates. The standard Respondent proposes would deprive parolees of the minimum process due.

Respondent contends that the rules pronounced in *Williams v. Superor Court, supra,* 230 Cal.App.4th 636 operate prospectively only. (RB 21, fn. 11.) Appellant disagrees. This Court has held, "'As a rule, judicial decisions apply 'retroactively.' [Citation.] Indeed, a legal system based on precedent has a built-in presumption of retroactivity.' [Citation.]" (*People v. Guerra* (1984) 37 Cal.3d 385, 399.) "To determine whether a decision should be given retroactive effect, California courts first undertake a threshold inquiry: does the decision establish a new rule of law? If it does, the new rule may or may not be retroactive . . . but if it does not, 'no question of retroactivity arises' because there is no material change in the law. [Citations.]" Among the examples cited in *Guerra* of cases

which do not establish a new rule of law for purposes of retroactivity are those "in which [the court] gave effect to a new statutory rule that the courts had theretofore misconstrued [citation] or had not definitively addressed [citation.] . . . . " *(Id.* at 399, fn. 13.)

This Court also discussed the retroactivity of opinions interpreting statutes in *People v. Garcia* (1984) 36 Cal.3d 539. "Whenever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim. [Citation.] If in addition . . . the decision represents the first authoritative construction of the enactment, no history of extended and justified reliance upon a contrary interpretation will arise to argue against retroactivity." (*Id.* at 549.)

The decision in *Williams* does not establish a new rule of law; rather, it vindicates the original meaning of a statute. (See *People v. Garcia, supra,* 36 Cal.3d at 549.) *DeLeon* was pending on appeal when *Williams* came down; *Williams* applies to *DeLeon* retroactively.

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 v. Brewer, supra,* 408 U.S. 471 and *Gagnon v. Scarpelli, supra,* 411 U.S. 778 do not compel a prompt and separate 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. Respondent argues that application of the

Mathews factors supports the conclusion that due process in parole revocation proceedings does not require separate hearings or the *Williams* 15-day deadline for probable cause hearings in every case. (RB 28-29.) Respondent is incorrect.

The first factor, the nature of the liberty interest at stake, requires "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; *Mathews v. Eldridge, supra,* 424 U.S. at 335.) As *Morrissey* noted, the liberty interest at stake in cases such as the present one 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.) 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 also has a stake in the parolee's liberty interest. (*Id.* at 471.) Thus, a substantial liberty interest is at stake, and the procedures given appellant in superior court were not sufficient.

The first factor weighs in favor of this Court adopting a set reasonable period of time for a separate probable cause hearing to take place. This will eliminate cases in which there is no probable cause to go forward. Failing to adopt this sort of rule could result in arbitrariness and potential equal protection problems. A system with those sorts of constitutional infirmities is not desirable.

A separate evidentiary probable cause hearing provides a parolee with a reliable determination of probable cause and an improved chance of not being held in custody

unnecessarily. The final revocation hearing should not be speeded up to join the probable cause determination in a prompt unitary proceeding. It would force a hurried gathering of evidence which would impede necessary functions. This is in accord with *Morrissey:* "What is needed [by way of procedural guarantees for the final revocation hearing] is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts, and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." (*Morrissey v. Brewer, supra,* 408 U.S. at 484.)

Critics note that "[m]ost people in county jails have not been convicted of the charges against them. Instead, more than sixty-three percent of the 82,000 Californians held in county jails on any given day are awaiting their day in court." (Hopper et al., *Shifting the Paradigm or Shifting the Problem? The Politics of California's Criminal Justice Realignment* (2014) 54 Santa Clara L. Rev. 529, 569.) Critics argue that "[h]igh rates of pretrial detention are a threat to public safety and civil liberties." (*Ibid.*) Having a probable cause hearing within 15 days of arrest of an alleged parole violator would help to solve that problem.

The public interest in ensuring that parolees are treated fairly is a substantial factor that a simple hearing would vindicate. The court in *Morrissey* recognized that society has an interest in treating parolees with basic fairness. Affording inmates fair treatment in the parole revocation process could have a positive impact on rehabilitation by preventing inmates' negative reactions to arbitrary decisions. (*Morrissey v. Brewer, supra,* 408 U.S. at 484.)

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. (*Mathews v. Eldridge, supra,* 424 U.S. at 335.) The timeliness requirement for the probable cause hearing is based in part on the parolee's liberty interest. A timely hearing means a minimal disruption in his life, and ensures that the best evidence will be available immediately after the alleged violation occurs. Respondent's alternatives (RB 30-31) do not present sufficient safeguards. The probable cause determinations referred to are not controlled by deadlines and are not adversarial. A judicial officer does not make a preliminary probable determination while issuing a warrant for rearrest in all cases. Neither does DAPO make a finding of good cause in all cases that a parolee committed a parole violation before imposing intermediate sanctions.

Respondent states, "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." (RB 31.) Appellant has discussed quite a few values in the opening brief. (AOB 23-26.) These include the right to question witnesses to determine whether probable cause exists, having the best evidence available immediately after the alleged violation occurs, and minimal disruption in the parolee's life. What Respondent suggests would not provide an adequate inquiry or a timely evidentiary record. Respondent's approach creates a substantial risk of an arbitrary and unreliable determination of probable cause.

There are many different types of parole conditions which could give rise to violations. For example, a parolee may have agreed to live within designated county limits. (See Pen. Code, § 3003.) He may have agreed to register with local authorities. (See Pen. Code, §§ 290, 457.1; Health & Saf. Code, § 11590.) He may have a condition that relates to the specific offense, including restrictions that prohibit accessing the internet. (See *In re Hudson* (2006) 143 Cal.App.4th 1, 9.) The broad scope of factual scenarios militates against probable cause determinations being made mechanically. When the stakes are so high, it is all the more important that the adversary presentation of relevant information be as unrestricted as possible. A full view of the facts and the opportunity to question live witnesses should be required.

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.

Respondent states, "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." (RB 33.) There is no legal citation after that sentence. Appellant disputes Respondent's characterization of the probable cause and final revocation hearings as "two hearings [which must be held] at or near the same time with virtually identical evidentiary content." (RB 33.) Appellant also disputes Respondent's assertion that holding

two hearings "would be a redundant and inefficient use of scarce judicial and administrative resources." (RB 33.)

Respondent states, "It is doubtful that all counties would be able to practically and effectively implement such a [dual hearing] system, especially those that can afford to devote only one calendar per week to parole revocation proceedings." (RB 33.) Respondent also posits that "[i]n some instances, the practical realities of the calendar would necessitate a separate probable cause hearing only nine days after arrest." (RB 33.) Respondent thus alludes to practical problems which might arise in the courts of different counties, but gives no data to support them. The Judicial Council and CDCR reports mentioned by Respondent (RB 34) do not discuss the additional workload demands placed upon the courts by the 2011 realignment legislation.

Whereas Respondent assumes having only one hearing would save money, Respondent does not point to any statistics to support this. Nor does Respondent respond to appellant's arguments that eliminating a preliminary probable cause hearing would not necessarily save money. (AOB 24-26.) As noted in *Morrissey,* the cost of imprisonment is so much greater than the parole system that procedural requirements will not change economic motivation. (*Morrissey v. Brewer,* 408 U.S. at 483, fn. 10, citing *Roe v. Haskins* (6th Cir. 1968) 388 F.2d 91, 102, fn. 16 (dis. opn. of Celebrezze, J.).)

Moreover, the decision should not be based on how congested the courts are. Any state interest in preserving scarce judicial resources is far outweighed by the potential for an erroneous determination of probable cause without a preliminary evidentiary hearing.

Any 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.

Balancing the *Mathews* factors, it must be determined that the procedural safeguard proposed by appellant to protect his liberty interest is simple: A preliminary evidentiary hearing within 15 days of arrest to determine whether probable cause exists. The Attorney General's suggestions for procedures for probable cause determinations are impractical and unfair and fail to allow an adequate inquiry into the question of whether probable cause exists. Failure to require a separate evidentiary probable cause hearing within 15 days would violate the procedural requirements of the Due Process Clause of the Fourteenth Amendment.

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, supra,* 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.)

Respondent argues, "California courts have approved of a unitary hearing procedure in other contexts as well as when the circumstances justifying a separate probable cause hearing do not exist or are overridden by other legitimate concerns." (RB 18.) Respondent also claims that *People v. Woodall* (2013) 216 Cal.App.4th 1221 has interpreted Penal Code section 1203.2, which now governs the parole revocation process, to hold that a unitary hearing is sufficient to satisfy the due process requirements of *Morrissey.* (RB 17.) *People v. Woodall,* however, is a probation revocation case.

Appellant has distinguished the probation context in Subsection D of the opening brief. (AOB 27-29.) Likewise, appellant distinguished *In re Bye* (1974) 12 Cal.3d 96 and *In re Anderson* (1977) 73 Cal.App.3d 38 in the cases of civil addict and insanity acquittee outpatients. (AOB 29-31.) Whereas unitary proccedings may have been appropriate in those contexts, they do not satisfy due process in the parole context. Respondent ignores that discussion. Instead, he sprinkles references to probation cases and mental health cases throughout his argument that a unitary hearing is sufficient for due process. Respondent cites to the probation cases mentioned above, as well as to *People v. Buford* (1974) 42 Cal.App.3d 975.

Respondent contends, "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 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." (RB 22-23, fn. 13.) One hundred eighty days is a long time; enough for a parolee to lose employment, housing, and community ties. It subjects a parolee to a deprivation of liberty. Revocation disrupts the individual's opportunity to "be gainfully employed and . . . to be with family and friends and to form the other enduring attachments of normal life." (*Morrissey v. Brewer, supra,* 408 U.S. at 482.) It could cause an individual to miss important life events. The high court in *Morrissey* did not use the length of incarceration as determinative of the process due, stating, that "[i]n many cases, [but not all] the parolee faces lengthy incarceration." (*Id.* at 482.) *Morrissey* was explicit that the liberty deprivation under the Fourteenth Amendment triggers due process protection. (*Id.* at 482.)

Moreover, appellant is dealing with the issue before this Court, which concerns parole revocation only. Probation revocation is not before this Court in the present case. In criminal trials, the Bill of Rights provides answers to the question of what procedural process is due. Respondent concedes that *Morrissey v. Brewer, supra,* 408 U.S. 471 and its progeny govern the constitutional requirements for the process due parolees, including the timely probable cause hearing requirement at revocation proceedings conducted by the superior court pursuant to section 1203.2. (RB 5.) Respondent further acknowledges that the Legislature has expressed this intent for *Morrissey* and its progeny to apply to judicial parole revocation proceedings. (RB 12.) Since *Morrissey* once applied to parole revocation proceedings when they were adminstrative, in view of Respondent's concessions, *Morrissey* should still apply to parole revocation proceedings in the courts.

The recent case of *People v. Byron* (2016) 246 Cal.App.4th 1009, review denied July 13, 2016, distinguished parole and probation revocation. There, the defendant argued that parole, probation, and PRCS revocation hearings were constitutionally indistinguishable and subject to "uniform supervision revocation process." (*Id.* at 1014.) The Court of Appeal held, "To so rule, this Court would have to rewrite the various statutes which treat parole, probation, and PRCS differently. (See e.g., *People v. Buena Vista Mines* (1996) 48 Cal.App.4th 1030, 1034.) If the legislature wants uniform rules, it should enact uniform rules, not separate statutory revocation procedures for parole, probation, and PRCS." (*People v. Byron, supra,* at 1014.) As applicable here, Penal Code section 3044 requires a probable cause hearing no later than 15 days following arrest for an alleged parole violation.

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. Respondent concedes that the "parole revocation proceedings that occurred in this case do not appear to have satisfied the due process requirements articulated in *Morrissey.*" (RB 35.)

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, supra,* 12 Cal.3d

at 154.) Appellant has shown in the opening brief that the errors at the probable cause hearing stage rendered the ensuing proceedings at which the final determination was made unfair or unreliable. (AOB 31-36.) Respondent has too narrow a construction of prejudice. *La Croix* uses the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 - "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." That is a tough standard to meet - and one the state, as the beneficiary of the error, bears the burden of establishing in this case. (*Chapman v. California, supra,* 386 U.S. at 24.) Here, it cannot be declared without reservation that denial of due process was harmless. For example, if appellant had no knowledge of what was on the cellphones, might he have been cut loose at a probable cause hearing?

To clarify what appellant means by the District Attorney's Office possibly being "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), trial counsel stated below that that office had been exceeding 15 days for a probable cause hearing. "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.)

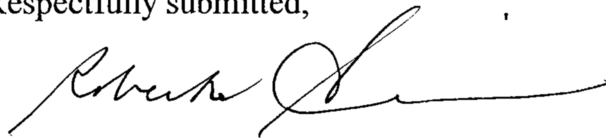
In this regard, *In re La Croix, supra,* 12 Cal.3d 146 applied the *Chapman* standard "in the absence of evidence that the Authority is not making a good faith effort to comply with *Morrissey* and our decisions in this respect." *(Id.* at 154.) It appears what defense counsel was arguing is that the District Attorney's Office was not making a good faith effort to comply with *Morrissey,* as it had been aware of the problem of not giving timely probable cause hearings and was not attending to it. If that is so, the need for a showing of prejudice may be abated.

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, appellant respectfully requests that this Court reverse the judgment.

Dated: August 2, 2016

Respectfully submitted,



ROBERTA SIMON
Attorney for Appellant
Allen Dimen DeLeon

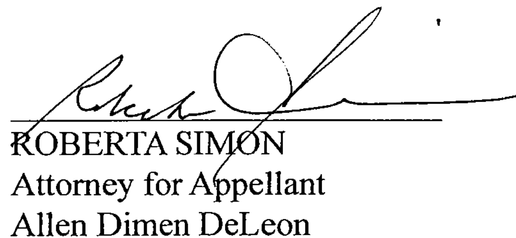
CERTIFICATE OF LENGTH

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 8,317 words, excluding the cover, the tables, this certificate, the signature block, and the statement of the issue. (Cal. Rules of Court, rule 8.520(c)(3).) 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 August 2, 2016, at Oakland, California.



ROBERTA SIMON
Attorney for Appellant
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 August 3, 2016, I served a true copy of the enclosed Appellant's Reply Brief on the Merits on each of the following, by placing same in an envelope addressed respectively as follows:

Office of the District Attorney
Solano County
675 Texas Street, Suite 4500
Fairfield, CA 94533
For Plaintiff,
The People of California

Allen Dimen DeLeon
c/o Nicholas Filloy, Esq.
Office of the Public Defender
Solano County
355 Tuolumne Street, Suite 2200
Vallejo, CA 94590
Defendant/Appellant

Honorable Robert Bowers
c/o Clerk, Solano County Superior Court
Hall of Justice
600 Union Avenue
Fairfield, CA 94533

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

On August 3, 2016, I transmitted a PDF version of this document by electronic mail to each of the following via TrueFiling:

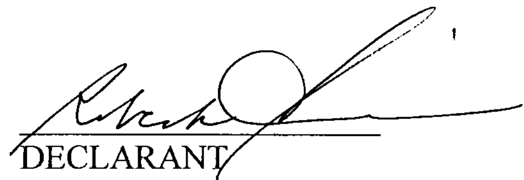
First District Appellate Project
Attention: Jeremy Price, Esq.

Office of the Attorney General
For Respondent,
The People of California

Court of Appeal, First Appellate District
Division Three

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

Executed on August 3, 2016, at Oakland, California.



DECLARANT