IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	No. S230906
Plaintiff and Respondent,	(First Appellate District, Div. Three, No. A140050)
v.	
ALLEN DIMEN DELEON,	
Defendant and Appellant.	

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF
and
BRIEF OF AMICUS CURIA
DISTRICT ATTORNEY OF LOS ANGELES COUNTY
in support of Plaintiff and Respondent
People of the State of California

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	)
ALLEN DIMEN DELEON,	)
	)
Defendant and Appellant.	)
	)

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF and BRIEF OF AMICUS CURIA DISTRICT ATTORNEY OF LOS ANGELES COUNTY in support of Plaintiff and Respondent People of the State of California

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	) No. S230906
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Plaintiff and Respondent,	) (First Appellate District,
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	)
ALLEN DIMEN DELEON,	)
	) **APPLICATION FOR**
Defendant and Appellant.	) **PERMISSION TO FILE**
	) **BRIEF OF AMICUS**
	) **CURIAE**

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The Los Angeles County District Attorney hereby applies for permission to file a brief as amicus curiae in the above-entitled matter, pursuant to Rule 8.520 (f) of the California Rules of Court, in support of Respondent, the People of the State of California.

The issue presented in the above-entitled action is whether, after passage of the 2011 Realignment Legislation and related bills, a parolee, facing allegations of committing a parole violation, must be granted a preliminary probable cause hearing prior to the parole revocation hearing, in order to meet due process standards under *Morrissey v. Brewer* (1972) 408 U.S. 471 [92 S.Ct. 25936, 33 L.Ed.2d 484] (*Morrissey*). As the largest prosecuting agency in the State of California, this issue is of great interest to the Los Angeles County District Attorney's Office.

The People are represented *sub judice* by the Office of the California Attorney General. We agree with the Attorney General that Appellant was not prejudiced by the revocation procedures and urge that the order below should be affirmed. However, the Los Angeles County District

Attorney parts ways with the Attorney General's position that the parole revocation procedures violated Appellant's due process rights.

Due process is flexible and "calls for such procedural protections as the particular situation demands." (*Morrissey, supra,* 408 U.S. at p. 481) When the California Legislature passed the 2011 Public Safety Realignment and the 2011 Realignment Legislation, it embraced the concept of subsidiarity to decentralize and shift certain responsibility for public safety to the counties so that offenders could be managed at the local level. As a result, partnerships between probation, the district attorney, public defenders, police agencies, and local courts were created to deter crime and to help an offender reintegrate into society and become productive. One aspect of this venture requires that superior courts, rather than executive agencies such as the California Department of Corrections and Rehabilitation in the case of parolees, be responsible for adjudicating violations of parole, probation, and post-release community supervision.

Appellant DeLeon and the Attorney General agree that the due process standards enunciated in *Morrissey v. Brewer, supra,* 408 U.S. 471 and *People v. Vickers* (1972) 8 Cal.3d 451 (*Vickers*) and its progeny apply to revocation hearings and that the Legislature intended to incorporate those procedural due process protections in the 2011 Realignment legislations. The Los Angeles County District Attorney's Office agrees with the Attorney General's conclusion, but for additional reasons not fully articulated in the briefing by the parties.

Specifically, the attached brief of amicus curiae asserts that the Appellant's parole revocation procedures were in compliance with the revocation scheme created by Realignment and did not violate his due process rights. The Los Angeles County District Attorney further urges this Court to permit local courts to adopt local rules for probation, post-release community supervision and parole revocation hearings as long as they

comport with due process standards of *Morrissey* and *Vickers* and its progeny. This conclusion is consistent with legislative intent as expressed in the legislative history of the 2011 Public Safety Realignment and section (2) of the 2011 Realignment Legislation.

If this Court grants this application, the Los Angeles County District Attorney, as amicus curiae, requests that the Court permit the filing of the brief which is bound with this application.

Respectfully submitted,

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District Attorney of
Los Angeles County

By

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Support of Plaintiff and
Respondent The People of the
State of California

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ALLEN DIMEN DELEON,	) **BRIEF OF AMICUS**
	) **CURIAE, LOS**
Defendant and Appellant.	) **ANGELES COUNTY**
	) **DISTRICT**
	) **ATTORNEY'S OFFICE**

INTRODUCTION

> It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.

(*Morrissey v. Brewer* (1972) 408 U.S. 471, 481 [92 S. Ct. 2593, 2600, 33 L.Ed.2d 484, 494] (*Morrissey*).)

On April 4, 2011, Governor Brown signed AB 109 into law, known as 2011 Public Safety Realignment. The law made fundamental changes to public safety in California by realigning certain low level offenders, adult parolees, and juvenile offenders from state to local jurisdictions. Among other aspects, the bill maintained state parole for certain specified offenders and released certain non-serious, non-violent, and non-high risk sexual offenders to post-release supervision by counties. The bill also gave authority to the state courts to determine all parole revocations.

The following year, the governor signed into law SB 1023, known as 2011 Realignment Legislation, that included various statutory amendments designed to promote uniform revocation procedures for probation, mandatory supervision, post-release community supervision, and parole. (2011 Realignment Legislation, SB 1023, Sec.2(a), eff. June 27, 2012,

Couzens & Bigelow, Felony Sentencing After Realignment, May 2016,at p. 124,<http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf > [as of August 31, 2016].) By amending Penal Code[1] sections 1170, subdivision (h)(5)(B), 3000.08, subdivision (f), and 3455, subdivision (a), to apply to probation revocation procedures under section 1203.2, the Legislature declared its intent to "simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under *Morrissey v. Brewer, supra,* 408 U.S. 471, and *People v. Vickers* (1972) 8 Cal.3d 451, and their progeny." (2011 Realignment Legislation, *supra,* sec. 2(b).) As a result, courts generally will apply longstanding probation revocation procedures under section 1203.2 to parole revocations. (*Couzens & Bigelow*, *supra,* at p. 124.)

In this case under review, Appellant DeLeon's parole revocation hearing was conducted after the passage of the 2011 Realignment Legislation and thus subject to revocations pursuant to sections 1203.2 and 3000.08. Appellant was arrested for a parole violation on August 23, 2013 and his parole was revoked on October 3, 2013.[2] (*People v. DeLeon* (2015) 241 Cal.App.4th 1059, 1064 (*DeLeon*).) Appellant contended that his revocation should be vacated because the superior court failed to conduct a preliminary probable cause hearing. The First Appellate District rejected Appellant's contention and determined that under the "parole revocation scheme embodied in Penal Code sections 1203.2 and 3000.08 as amended by the 2011 Realignment Act, superior courts are not required to conduct preliminary probable cause hearings as specified in *Morrissey v. Brewer*

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1. Undesignated statutory references are to the Penal Code.

2. Because *Williams v. Superior Court* (2014) 230 Cal.App.4th 636 was filed on October 14, 2014, its holding did not impact the proceedings in the superior court at the time.

(citations omitted) before revoking parole, and that a timely single hearing procedure can suffice." (*Id.* at pp. 1063-1064.)

Amicus Curiae, The Los Angeles County District Attorney, submits that the Court of Appeal correctly ruled that Appellant's due process rights were not violated, that a timely unitary parole revocation hearing is consistent with California's parole/probation revocation scheme, that a preliminary probable cause hearing is not constitutionally required, and that Appellant has not shown prejudice at the parole revocation hearing. In any revocation hearing, the parolee or probationer has an interest in retaining his or her conditional liberty, and the State has an interest in assuring that revocation proceedings are based on accurate findings of fact and, where appropriate, the informed exercise of discretion without requiring undue fiscal and administrative burdens from additional procedures. (*Matthews v. Eldridge* (1976) 424 U.S. 319 [96 S.Ct. 896, 47 L.Ed.2d 18] (*Matthews*).) Under these standards, the court can "accommodate these interests while avoiding the imposition of rigid requirements that would threaten the informal nature of probation revocation proceedings or interfere with exercise of discretion by the sentencing authority." (*Black v. Romano* (1985) 471 U.S. 606, 611 [105 S. Ct. 2254, 85 L.Ed.2d 636].)

Amicus Curiae further urges this Court to permit local courts to adopt local rules for probation, post-release community supervision and parole revocation hearings which fairly serves their population of supervised persons without over-burdening judicial resources as long as they comport with due process standards. This request is consistent with legislative intent as expressed in the legislative history of the 2011 Public Safety Realignment and section (2) of the 2011 Realignment Legislation.

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ARGUMENT

I

APPELLANT'S PAROLE REVOCATION HEARING COMPLIED WITH PENAL CODE SECTIONS 1203.2 AND 3000.08; HE WAS NOT DENIED DUE PROCESS

A

California's Parole Revocation Statutes After Realignment Meets All Constitutional Requirements Under *Morrissey* and *Vickers*

The seminal case that established due process standards for parole violations is *Morrissey v. Brewer, supra,* 408 U.S. 471 (*Morrissey*). *Morrissey* recognized that parolees enjoy a "conditional liberty" requiring constitutional protection and that both the parolee and society have a stake "in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole . . . ." (*Morrissey, supra*, 408 U.S. at p. 496.) Parole violations have two distinct analytical components: first, a wholly retrospective factual question of whether the parolee has in fact acted in violation of one or more conditions of his parole. After it has been determined that the parolee did violate the conditions, the second question arises: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? (*Id.* at pp. 479-782.)

Morrissey established the minimum due process required for parole revocations:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers

> or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

(*Morrissey, supra*, 408 U.S. at p. 489.) The Court held that a "parolee is entitled to two hearings, one a preliminary hearing at the time of his arrest to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other *a somewhat more comprehensive hearing* prior to the making of the final revocation decision." (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 781-782, [93 S.Ct. 1756, 1759; 36 L.Ed.2d 656] (*Gagnon*) (italics added); *In re La Croix* (1974) 12 Cal.3d 146, 152 [a parolee who has not waived his right is entitled to a prerevocation hearing as mandated by *Morrissey*].) In *Vickers, supra,* 8 Cal.3d 451, our Supreme Court adopted and applied *Morrissey's* due process standard to probation violations.

California's 2011 Realignment Legislation amended sections 1203.2 and 3000.08.[3] Generally, a person released from prison is subject to a period of either parole (§ 3000 et seq.) or post-release community supervision (§ 3450 et seq.). (*People v. Cruz* (2012) 207 Cal.App.4th 664, 672.) Parole applies to high-level offenders, i.e., third strikers, high-risk sex offenders, and persons imprisoned for serious or violent felonies or who have a severe mental disorder and committed specified crimes. (§ 3451, subd. (b).) These parolees are supervised by the California Department of Corrections and Rehabilitation (CDCR) and are under the jurisdiction of the court for purposes of adjudicating parole violations. (§ 3000.08, subd. (a).) All other released persons are placed on post-release community supervision. (§§ 3000.08, subd.(b), 3451, subd. (a); *People v. Armogeda* (2015) 233

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3. Section 1203.2 was amended by Stats. 2012, c. 43, SB 1023, §30, eff. June 27, 2012. Section 3000.08 was added by Stats. 2011, c. 39, A.B.117, §38. eff. June 30, 2011, operative July 1, 2013.

Cal.App.4th 428, 434.) These parolees are under the supervision of community probation and the jurisdiction of the court for purposes of adjudicating parole violations. (§§1203.2, subd. (b)(1), 3000.08, subd. (b), 3455.)

The supervising agency may arrest supervised persons upon probable cause. (§ 1203.2, subd. (a).) The superior court may issue a warrant and determine whether the supervised person has violated any condition of supervision. (*Ibid.*) In relevant part, section 1203.2 states:

> At any time during the period of supervision of a person (1) released on probation under the care of a probation officer pursuant to this chapter, (2) released on conditional sentence or summary probation not under the care of a probation officer, (3) placed on mandatory supervision pursuant to subparagraph (B) of paragraph (5) of subdivision (h) of Section 1170, (4) subject to revocation of post-release community supervision pursuant to Section 3455, or (5) subject to revocation of parole supervision pursuant to Section 3000.08, if any probation officer, parole officer, or peace officer has probable cause to believe that the supervised person is violating any term or condition of his or her supervision, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the supervised person and bring him or her before the court or the court may, in its discretion, issue a warrant for his or her rearrest....Upon rearrest, or upon the issuance of a warrant for rearrest, the court may revoke and terminate the supervision of the person if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless of whether he or she has been prosecuted for those offenses. However, the court shall not terminate parole pursuant to this section.

(§ 1203.2, subd. (a).) It is noteworthy that prior to Realignment, parole revocations were heard by the CDCR at a state facility, but after Realignment, "[t]he court in the county in which the person is supervised has

jurisdiction to hear the motion or petition, or those on parole, either the court in the county of supervision or the court in the county in which the alleged violation of supervision occurred." (§ 1203.2, subd. (b).)

Section 1203.2 complies with due process's notice requirements. It directs the court to

> give notice of its motion, and the probation or parole officer or the district attorney shall give notice of his or her petition to the supervised person, his or her attorney of record, and the district attorney or the probation or parole officer, as the case may be. The supervised person shall give notice of his or her petition to the probation or parole office and notice of any motion or petition shall be given to the district attorney in all cases. The court shall refer its motion or the petition to the probation or parole officer.

(§ 1203.2, subd. (b)(1).) As to the timing, the notice may be given to the supervised person upon his or her first court appearance in the proceeding. (§1203.2. subd. (b)(2).) Then upon receipt of a written report from the probation or parole officer, the court "shall read and consider the report and either its motion or the petition and may modify, revoke, or terminate the supervision of the supervised person upon the grounds set forth in subdivision (a) if the interests of justice so require." (§ 1203.2, subd. (b)(1).) The supervised person must be informed of his or her right to counsel prior to the modification or termination and waiver of appearance. (§1203.2, subd. (b)(2).)

Thus, under section 1203.2 and the cases discussing its application to probation revocation proceedings, the accused person has the following rights which equal or exceed those required by *Morrissey*: a timely arraignment, including the opportunity for probable cause determination, service of a written petition indicating the charges, appointment of counsel, discovery of evidence, neutral and detached hearing officer, right to be present at all hearings, full adversarial evidentiary hearing, a public hearing

in a courtroom, opportunity to be heard and present evidence, right to confront and cross-examine witnesses, and a transcript of the proceedings. (*Couzens & Bigelow, supra*, at p. 148.) Like section 1203.2, section 3000.08, subdivision (c) restates the authority of the parole agent or peace officer to arrest the person and their duty to bring the person before the court if they have probable cause to believe that the parolee is violating any term or condition of parole.

Realignment created and gave the parole agency sole authority to impose intermediate sanctions for alleged violations: the supervised person is subject to "flash incarceration" in the county jail not to exceed 10 consecutive days. (§3000.08, subds. (d)(e).) However, if flash incarceration is not an appropriate sanction,

> the supervising parole agency shall, pursuant to Section 1203.2 petition either the court in the county in which the parolee is being supervised or the court in the county in which the alleged violation of supervision occurred, to revoke parole. At any point during the process initiated pursuant to this section, a parolee may waive in writing, his or her right to counsel, admit the parole violation, waive a court hearing, and accept the proposed parole modification or revocation. The petition shall include a written report that contains additional information regarding the petition, including the relevant terms and conditions of parole, the circumstances of the alleged underlying violation, the history and background of the parolee, and any recommendation. The Judicial Council shall adopt forms and rules of court to establish uniform statewide procedures to implement this subdivision, including the minimum contents of supervision agency reports. Upon a finding that the person has violated the conditions of parole the court shall have authority to do any of the following...(2) Revoke parole and order the person to confinement in the county jail...

(§3000.08, subd. (f).)

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The parole revocation procedures enumerated in sections 1203.2 and 3000.08 incorporate the due process requirements of *Morrissey.* Under the statutes, the supervised person is given written notice of the violation and the evidence supporting the violation; the supervised person is brought before the court and is appointed counsel; and the supervised person may have a hearing before a judge, cross-examine witnesses, and present evidence at the revocation hearing. The statutes do not contain timetables or schedules of when hearings must be held; neither does *Morrissey.* However, in a parole violation, *Williams v. Superior Court, supra,* 230 Cal.App.4th 636 (*Williams*) established the right to be arraigned within 10 days after arrest, the right to a probable cause hearing 15 days after an arrest, and the right to a full parole revocation hearing within 45 days of arrest.

Another feature of the 2011 Realignment Legislation amended section 1203.2 and "provide[d] for a uniform supervision revocation process for petitions to revoke probation, mandatory supervision, post release community supervision, and parole." (2011 Realignment Legislation, *supra,* §2(a), *Couzens & Bigelow, supra,* at p. 124; but see, *People v. Byron* (2016) 246 Cal.App.4th 1009, 1014 [declining to apply uniform revocation procedures for parole, probation, and PRCS, noting that there are statutes treating parole, probation, and PRCS differently, but rejecting claim that failure to arraign in superior court within 10 days is violation of due process in PRCS revocation].) This amendment collected various forms of supervision and streamlined their revocation procedures and processes. Parole revocations were solely determined by the Board of Parole Hearings under section 3044; but under the Realignment Legislation, with some exceptions, would be determined by the superior court. Thus, parole violations and probation violations should be treated uniformly. In practice, courts will apply longstanding probation revocation procedures under section 1203.2 to parole revocations. (*Couzens & Bigelow, supra,* at p. 124.)

Probation revocation adjudications in the superior court generally consist of a judicial determination of probable cause followed by a full adversarial revocation hearing. Cases have held that a summary revocation of probation may be based upon a probation officer's report, but thereafter the probationer must be afforded a second-stage *Morrissey* hearing with its attendant due process protections. (*People v. Arreola* (1994) 7 Cal.4th 1144, 1153.) Thus, to effectuate the legislative intent for consistency in revocation procedures among different types of supervision, in practice, because the court need not conduct formal probable cause hearings for probation revocations, courts need not conduct them for PRCS or parole revocations. (*Couzens & Bigelow, supra,* at p. 151.)

This Court in *People v. Coleman* (1975) 13 Cal.3d 867, 894-895 (*Coleman*), stated that it was not necessary to provide a probationer faced with revocation proceedings a "prerevocation" hearing as described in *Morrissey*. This Court reasoned that California's judicial procedure already affords due process in that there is a judicial determination of probable cause and that a full revocation hearing with all the panoply of *Morrissey* procedural rights occurs shortly thereafter. (*Ibid.*) A probation hearing, is a

> judicial proceeding with concomitant procedural benefits for a probationer at all stages of the revocation process. Usually a judicial determination of probable cause precedes the arrest of a probationer for violations of the conditions of his probation, and the formal revocation hearing with its full panoply of *Morrissey* procedural rights occurs relatively soon after the probationer has been deprived of his conditional liberty. Since "*the precise nature of the proceedings for [probation] revocation need not be identical" to the bifurcated Morrissey parole revocation procedures*, so long as "equivalent due process safeguards" assure that a probationer is not arbitrarily deprived of his conditional liberty for any significant period of time (*People v. Vickers, supra*, 8 Cal.3d at p. 458) *a unitary hearing* will usually suffice in probation revocation cases to serve the purposes of the separate preliminary and formal revocation hearings outline in *Morrissey*. (Citations omitted.)

(*People v. Coleman, supra*, 8 Cal.3d at p. 894-895 (italics added).) Similarly, approving of a unitary hearing, the *Vickers* court stated that "the precise nature of the proceedings for [probation] revocation need not be identical" to the bifurcated *Morrissey* parole revocation procedures, so long as "equivalent due process safeguards" assure that a probationer is not arbitrarily deprived of his conditional liberty for any significant period of time. (*People v. Vickers, supra*, 8 Cal.3d at p. 458.)

Likewise, in *People v. Buford* (1974) 42 Cal.App.3d 975 (*Buford*), the court held that the absence of prerevocation probation hearing did not deprive the defendant of due process. The court explained that "neither *Morrissey* nor its progeny held that a prerevocation hearing is a prerequisite to revoking probation in California and distinguished *Gagnon*, a Wisconsin probation case, because Gagnon's probation was supervised and revoked solely by an administrative agency. (*Buford, supra,* 42 Cal.App.3d at p. 980.)

The court further explained that a major reason for the prerevocation hearing requirement was the "time lag between arrest of the parolee and final determination on the merits of the parole agent's allegation." (*Buford, supra,* 42 Cal.App.3d at p. 980.) The other reason for a prerevocation hearing was that the parolee was often arrested at some distance from the penal institution where the final revocation hearing would be held. (*Ibid.*) Buford had his final revocation hearing 21 days after the revocation petition was filed in court and it appears his hearing was in the county in which he was supervised. (*Ibid.*) Moreover, Buford's hearing was a judicial proceeding which provided the "use of court processes, thus assuring him the presence of necessary witnesses." (*Ibid.*) The *Buford* court emphasized that due process is flexible and "'calls for such procedural protections as the particular situation demands.' (*Morrissey v. Brewer, supra*,

408 U.S. at p. 481 [33 L.Ed.2d at p. 494]; see also *Gagnon v. Scarpelli, supra*, 411 U.S. at p. 790 [36 L.Ed.2d at p. 666].) Thus a prerevocation hearing is not mandated where the circumstances requiring it do not exist." (*Id.* at p. 981; see also *People v. Andre* (1974) 37 Cal. App. 3d 516, 521-522.) Therefore, unitary hearings comply with due process and have become the common practice in probation violation procedures in the superior courts.

B

Appellant's Revocation Hearing Complied With Sections 1203.2 and 3000.08; He Was Not Denied Due Process

The Los Angeles District Attorney (LADA) parts way with the Attorney General that Appellant's due process rights were violated. LADA asserts that Appellant received due process under *Morrissey* and sections 1203.2 and 3000.08. Revocation procedures complying with *Morrissey* and *Vickers* must include reasonable safeguards against mistakes and proceed with reasonable diligence. Fundamental fairness is the touchstone of due process. (*Gagnon, supra,* 411 U.S. at p. 1763.) Appellant's parole revocation procedure included notice and the appointment of counsel, a timely arraignment and judicial determination that probable cause existed to revoke his parole, the functional equivalent of a probable cause hearing, and a full and expeditious adversarial unitary revocation hearing. Appellant was not denied due process.

According to the opinion under review, Appellant was released to parole on July 25, 2010 following his 2003 conviction for a lewd act committed on a minor. Among the conditions of parole, he was prohibited from possessing any pornographic material, material that depicted adults or

children in undergarments, or devices for viewing sexually explicit programming. During a compliance check on August 23, 2013, Appellant was arrested when his parole agent found him in possession of a cell phone containing a pornographic video. CDCR determined that there was probable cause for the charges and Appellant was given notice of the parole violation on August 26, 2013. A petition to revoke was referred to the superior court on August 30, and a petition to revoke was filed in the superior court, five days later, on September 4, 2013. (*DeLeon, supra,* 241 Cal.App.4th at p. 1064.)

On September 6, 2013, a judicial officer reviewed the violation report, concluded there was probable cause to support revocation, revoked parole, and scheduled a revocation hearing on September 11, 2013. (*DeLeon, supra*, at p. 1064.) On September 11, Appellant appeared with appointed counsel and moved to dismiss the charges on the grounds that he did not get a probable cause hearing within 15 days of his arrest. The court set a further hearing and a briefing schedule. The motion to dismiss was heard and denied on September 25 and Appellant's revocation hearing was held October 3rd, 41 days after his arrest. (*Ibid.*) After hearing testimony from the parole agent, the court revoked Appellant's parole and sentenced him to 180 days in custody. (*Id.* at p. 1065.)

"'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (*Cafeteria Workers v. McElroy*, (1961) 367 U.S. 886, 895 [81 S.Ct. 1743, 6 L.Ed.2d 1230].) Thus, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands....Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." (*Morrissey, supra,* at p. 481.) In *Matthews, supra*, 424 U.S. 319 the United States Supreme Court set out three factors to

determine the dictates of due process. The first factor is: the private interest that will be affected by the official action. The second factor is the risk of an erroneous deprivation of liberty through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. (*Matthews, supra*, 424 U.S. at p. 335.) And finally, the third factor is the "Government's interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Ibid.*)

Certainly, Appellant has an interest in his continued liberty. However, it is only a conditional liberty as it is dependent on his obedience of parole conditions. (*Morrissey, supra*, at p. 480.) Although a "probable cause hearing" guards against arbitrary or capricious deprivation of a parolee's conditional liberty, the procedures Appellant received also protected his interest. Appellant received written notice of the charges against him. An official uninvolved in Petitioner's parole supervision and a judge promptly determined that the charges were supported by probable cause. Appellant was appointed counsel who received the documentation supporting the charges, and those charges were substantiated at an evidentiary hearing. (*DeLeon, supra,* at p. 1068.) The prompt probable cause review of the charges and the parole violation report by a judicial officer as specified in section 1203.2, subdivisions (a)(1) and (b)(2) guarded against the risk of an erroneous deprivation of liberty pending a full revocation hearing. (*Ibid.*) The appointment of counsel pursuant to section 1203.2 also guarded against the risk of wrongful detention or revocation based on meritless charges. There are no additional procedures that could add more confidence to the determination of temporary detention at this stage of the revocation proceedings.

Another safeguard against an erroneous deprivation of liberty is an expeditious proceeding. Here, Appellant's parole revocation process

proceeded without delay. Three days after his arrest, an official uninvolved in Appellant's supervision determined there was probable cause that he violated a condition of parole and Appellant received written notice of the charges against him. Four days later, a petition to revoke was referred to the superior court and the petition to revoke was filed in the court four days later. Two days after that, a judge determined that the charges were supported by probable cause, revoked parole, and appointed counsel for Appellant. Counsel received the documentation supporting the charges and a parole revocation hearing was scheduled five days later. (*DeLeon*, at p. 1068.)

Indeed, Appellant's revocation hearing was scheduled 18 days after his arrest.[4] Rather than going forward with the revocation hearing, Appellant filed a motion to dismiss on the grounds that he did not receive a probable cause hearing 15 days after his arrest. When the motion to dismiss was heard and denied 14 days later, he had the functional equivalent of a preliminary probable cause hearing with all of its attendant due process rights. (See *People v. Byron, supra*, 246 Cal.App.4th at p. 1017 [PRCS probationer whose hearing on motion to dismiss was tantamount to a second probable cause hearing].) In any event, Appellant's charges were substantiated at an evidentiary hearing on October 3, 2013. (*DeLeon*, at p.1068.) Had Petitioner adjudicated the alleged parole violation on the date originally scheduled, he would have had his revocation hearing just 18 days after his arrest. Even so, his revocation hearing was heard 41 days after his arrest. There was no violation of due process on timeliness grounds. (*Morrissey, supra,* at p. 488 [commenting that the revocation hearing held two months later would not appear to be unreasonable].)

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4. Of these 18 days, 3 were Saturdays, 3 were Sundays, and 1 was a holiday.

The third *Matthews* factor considers the burden to the administration of justice. Concerning the administrative and fiscal burden to the government, the *Matthews* court said:

> Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.

(*Matthews, supra,* at p. 348.)

Here, the government has an interest in the orderly and expeditious functioning of the courts, including timely probation and parole revocation proceedings. However, in 2015, the Judicial Council of California reported a need for over 200 judicial officers to adequately address the work in California's superior courts. (Judicial Council of Cal., Court Statistics Report (2015) p. 54, <http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf> [as of August 31, 2016].) As discussed above, requiring a preliminary probable cause hearing adds little benefit to the fair determination of parole revocation, yet it will substantially add to the already heavy workload of our superior courts.

Considering each of the *Matthews* factors, Appellant received more than the minimum *Morrissey* due process protections. He received notice and documentary evidence of the charges against him, a probable cause determination by a judge, he had a full adversarial hearing before a judge in an open courtroom with a court reporter, and he was appointed

counsel. His process also included a "pretrial" motion to dismiss that was fully litigated, which was the functional equivalent of a probable cause hearing, in addition to the court's probable cause determination. (See, *People v. Byron, supra*, at p. 1017.) Therefore, Appellant was not denied due process.

II

THE FLEXIBILITY OF DUE PROCESS DOES NOT MANDATE PRELIMINARY PROBABLE CAUSE HEARINGS; LOCAL COURTS SHOULD DEVELOP THEIR OWN REVOCATION RULES

The Realignment Legislations embraced the principles of "subsidiarity" when it created a new system for handling parole and probation revocations. "Subsidiarity is the concept that a central authority should have a subsidiary function, performing only those tasks that cannot be performed effectively at a more immediate or local level. It is the idea that problems are best solved where they occur in an organization." (*Kelly v. State* (2014) 436 S.W.3d 313, 322 (conc. opn. Keller, P.J.).) Thus, returning control over its parolees and probations to the local court is one expression of subsidiarity. (See, Edmund G. Brown Jr., State of the State Address, January 22, 2014, <http://www.gov.ca.gov/news.php?id=18373> [as of August 17, 2016] ["in the field of public safety, we have changed historic practices in our prison system and transferred significant responsibilities to local authorities. The Federal courts, backed up by the United States Supreme Court have ordered major reductions in our prison population and dramatic improvements in the medical and mental health programs that the state makes available. In response, we have transferred the

supervision of tens of thousands of lower level offenders from the state to our 58 counties. This realignment is bold and far reaching, but necessary under the circumstances. And local law enforcement has risen to the occasion"].)

Realignment's purpose was not to impose uniformity throughout the State of California; its purpose was to treat all supervised persons in a particular locality uniformly. To effectuate that purpose, counties may develop and control their local parole revocation procedures, integrating new players such as county jails, district attorneys, public defenders, and the local court into the process. AB 109 states,

> This bill would also require the courts to establish a process to determine if there has been a violation of the conditions of the postrelease supervision, and the courts would be authorized to take certain actions upon such a finding. The bill would establish within each county local Community Corrections Partnership an executive committee, as specified, to recommend a local plan to the county board of supervisors on how the 2011 Public Safety Realignment should be implemented within that county.

(AB 109, Legislative Counsel Digest, (8), <http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_bill_20110329_enrolled.html> [as of August 17, 2016].) In order to effectuate the purpose of Realignment, local courts must be free to adopt local rules.

Although *Morrissey* and the statutory scheme in sections 1203.2 and 3000.08 do not prescribe a time frame in which the revocation hearing must be held, the *Williams* court determined that in parole revocation proceedings, a parolee is entitled to be arraigned within 10 days of an arrest for a parole violation, a probable cause hearing within 15 days of the arrest, and a final revocation hearing within 45 days of the arrest. (*Williams, supra,* 230 Cal.App.4th at p. 643.) As discussed *supra*, due process does not require a probable cause hearing unless there has been a significant delay from the

time of arrest to the final revocation hearing and that a great distance exists between the place where the alleged violation occurred and the place where the revocation hearing will take place. Even so, complying with the *Williams* timetable would place a substantial burden on California counties, and in particular, on Los Angeles County due to its large population of parolees.

In 2015, according to the CDCR, there were 45,473 active parolees supervised in California.[5] (Office of Research, CDCR, Population Projections, Spring 2016, May, 2016, p. 18. <http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Projections/S16Pub.pdf> [as of August 30, 2016].) This number of parolees does not include the population of individuals supervised under PRCS and other probationary terms subject to revocation. CDCR projects the active parole population would be: 43,273 in 2016, 42,499 in 2017, and 42,343 in 2018. (*Ibid.*) While the total number of parolees released to counties in 2015 is not available, CDCR reports that in the year 2010-2011, Los Angeles County received the greatest number of parolees, 26% or 24,904 parolees. (Office of Research, CDCR, 2015 Outcome Evaluation Report, An Examination of Offenders Released in Fiscal Year 2010-11, August, 2016, p. 6, at <http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/2015_Outcome_Evaluation_Report_8-25-2016.pdf> [as of August 30, 2016].) In comparison, San Bernardino County received 8.4% or 8,018 parolees, Orange County received 7.1% or 6,804 parolees, San Diego County received 6.7% or 6,431 parolees, Riverside County received 6.5% or 6,201 parolees, and Sacramento County received 6.5% or 5,698 parolees. (*Ibid.*) All other counties received less than 4.5% of parolees each, except that Stanislaus County was separately identified as receiving the fewest number

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5. The number of parolees declined dramatically from a high population of 126,330 in 2007 due to Prop. 47, Realignment, and other measures reducing prison population since 2007.

of parolees: 1,618 or 1.7%. (*Ibid.*) The remaining counties in California received a total of 19,475 parolees, or 20.4% of the total. (*Ibid.*) Extrapolating from the projected parole population in 2016, it is estimated that Los Angeles County could expect 26% of the parolee population of 43,273, or 11,251 parolees. Meanwhile, Stanislaus County could receive an estimated 1.7%, or 736 parolees in 2016.

These bare statistics demonstrate that a large county such as Los Angeles bears a substantial burden under the *Williams* timetable. In other respects, small counties such as Del Norte, Trinity, Modoc, Lassen, Glenn, Colusa, Amador, Calaveras, Mono, Alpine, Sierra, Plumas, Mariposa, San Benito, and Inyo that have only *two* judgeships in each county would similarly bear a heavy burden under *Williams*. (*Judicial Council of Cal., supra*, at p. xxii.) As discussed above, neither *Morrissey* nor section 1203.2 require a probable cause hearing within 15 days of arraignment. Moreover, since the preliminary probable cause hearing, like a preliminary hearing in a criminal case, is simply to determine whether there is probable cause for revocation and not a determination of credibility or weighing of evidence, it is duplicative of the judicial officer's determination of probable cause held just 5 days before.

To lessen the judicial strain, local courts should be able to enact a local rule that provides for a preliminary probable cause hearing upon offer of proof and timely request, but deeming the hearing waived upon failure to make the request. This will accommodate parolees who wish to present an affirmative defense or otherwise have legitimate issues that might need to be addressed swiftly. In reality, the majority of parole violations are straightforward and are admitted to by the parolee without the necessity for a full hearing. By making the probable cause hearing available upon timely request, judicial workload would be less impacted and constitutional concerns could be addressed.

Alternatively, local courts can enact rules that relax evidentiary rules during a preliminary probable cause hearing so that the hearing officer may consider evidence including letters, affidavits, and other material that would not be admissible in an adversarial criminal trial. These small accommodations applies flexibility to revocation hearings and provides procedural protections concomitantly and satisfies the standards in *Morrissey*.

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CONCLUSION

Morrissey did not impose an inflexible parole revocation procedure on the States; each State has met that responsibility by enacting its own legislation. Likewise, the California Legislature did not impose a rigid revocation process on the 58 counties in California when it enacted and amended the Realignment Legislations. In fact, its purpose was the opposite: to return responsibility for lower level offenders to the county level so that they could be managed in smarter and cost-effective ways. The procedures in this case did just that, and they demonstrated reasonableness, fairness, and flexibility, all in compliance with due process.

Respectfully submitted,

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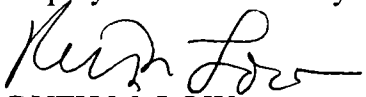

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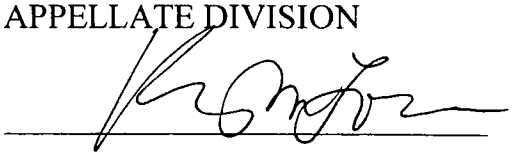
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the enclosed Application For Permission to File Amicus Curiae Brief and Brief of Amicus Curiae is produced using 13-point Roman type, and contains approximately 6,823 words, including footnotes, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: This 6th of September, 2016

LOS ANGELES COUNTY
DISTRICT ATTORNEY'S OFFICE
APPELLATE DIVISION



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DECLARATION OF SERVICE BY MAIL

People v. Allen Dimen DeLeon; Case No. S230906;

Court of Appeal, Case No. A140050

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause, and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. On the date of execution hereof I served the attached document entitled APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail in the County and City of Los Angeles, California, addressed as follows:

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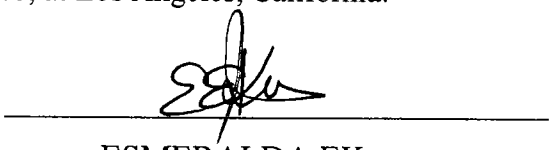
Executed on September 6, 2016, at Los Angeles, California.



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