Judicial Council of California . Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 28, 2011

Title
Criminal Justice Realignment: Postrelease Community Supervision Revocation Procedure

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rules 4.540 and 4.541 and form CR-300

Recommended by
Criminal Law Advisory Committee
Hon. Steven Z. Perren, Chair

Agenda Item Type
Action Required

Effective Date
October 28, 2011

Date of Report
October 6, 2011

Contact
Arturo Castro, 415-865-7702
arturo.castro@jud.ca.gov

Executive Summary

The Criminal Law Advisory Committee recommends adoption of two rules of court and a mandatory form to govern procedure for revoking postrelease community supervision, as required by recently enacted criminal justice realignment legislation.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective October 28, 2011:

1. Adopt rule 4.540 of the California Rules of Court to govern procedure for revoking postrelease community supervision under Penal Code section 3455, including notice, hearing, probable cause, and waiver requirements;
2. Adopt rule 4.541 of the California Rules of Court to prescribe supervising agency report requirements, including minimum contents; and

3. Adopt *Petition for Revocation of Community Supervision* (form CR-300) for use by supervising agencies to request revocations of supervision and by courts to make certain findings and orders.

The text of the rules and the form are attached at pages 8–15.

Previous Council Action

There is no previous Judicial Council action to report as this is in response to new legislation. The section of this report on "Implementation Requirements, Costs, and Operational Impacts" includes information on related budget allocations approved by the council earlier this year.

Rationale for Recommendation

Recent criminal justice realignment legislation[1] implemented sweeping changes to long-standing sentencing laws and parole procedures, including a shift of parole supervision and revocation authority over certain low-level parolees from the California Department of Corrections and Rehabilitation (CDCR) to courts and local supervising agencies. The new supervision scheme for low-level offenders is entitled "postrelease community supervision" and became effective October 1, 2011.[2] The realignment legislation specifically requires the Judicial Council to "adopt forms and rules of court to establish uniform statewide procedures to implement [community supervision revocation proceedings], including the minimum contents of supervising agency reports." (Pen. Code, § 3455(a).)

Statutory community supervision revocation procedure

Under the new community supervision scheme, local county agencies responsible for community supervision (supervising agencies) are authorized to determine and order appropriate responses to violations of the terms of supervision without court involvement, including incarceration for up to 10 days. (Pen. Code, § 3454(b)–(c).) If the supervising agency determines, following application of its "assessment processes," that intermediate sanctions are not appropriate responses to an alleged violation, the agency may petition the court to revoke and terminate community supervision. (Pen. Code, § 3455(a).) At any point during the revocation process, "a person may waive, in writing, his or her right to counsel, admit the violation of his or her postrelease supervision, waive a court hearing, and accept the proposed modification of his or her postrelease supervision." *(Ibid.)*

Petitions to revoke supervision must include written reports that contain "additional information regarding the petition, including the relevant terms and conditions of postrelease supervision, the circumstances of the alleged underlying violation, the history and background of the violator, and any recommendations." (Pen. Code, § 3455(a).)

[1] Assem. Bill 109 (Committee on Budget), Stats. 2011, ch. 15; AB 117 (Committee on Budget), Stats. 2011, ch. 39; ABX1 17 (Blumenfield), Stats. 2011, ch. 12.

[2] The realignment legislation also requires courts to conduct revocation proceedings for parolees that remain under the supervision of CDCR beginning July 1, 2013.

Penal Code section 3455(b) requires courts to conduct revocation hearings "within a reasonable time after the filing of the revocation petition." Penal Code section 3455 also provides that upon a finding of a violation, the court is authorized to revoke supervision and impose specified sanctions and modifications of supervision, including up to 180 days in county jail. (Pen. Code, § 3455(a)(1)–(3).)

Rule 4.540

Rule 4.540 is designed to prescribe minimal procedural requirements to assist courts in implementing the new procedures while providing courts with broad discretion to conduct the proceedings in accordance with local needs and customs. In sum, the rule:

- Requires the supervising agency, before filing the petition, to establish probable cause and, if the supervised person desires counsel, to refer the matter to the public defender or other agency designated by the county to represent supervised persons;

- Requires the supervising agency to provide copies of the petition and written report to the prosecutor and supervised person's counsel or, if unrepresented, to the supervised person;

- Requires the court to review whether probable cause exists to support a revocation of community supervision within five court days of the filing of a petition;

- Prescribes specific requirements for notice of hearings;

- Clarifies that the standard of proof at the revocation hearing is a preponderance of the evidence and the statutory and decisional law that governs the admissibility of evidence at probation violation proceedings applies; and

- Requires courts to make certain written findings.

Rule 4.541

The purpose of rule 4.541 is to prescribe the minimum contents of supervising agency reports as required by Penal Code section 3455(a). The minimum contents include information about the supervised person, relevant conditions of supervision, circumstances of the alleged violations, a summary of all previous violations and sanctions, and any recommendations. The rule also authorizes supervising agencies to update previous reports for subsequent revocation proceedings involving the same supervised person.

***Petition for Revocation of Community Supervision* (form CR-300)**

The *Petition for Revocation of Community Supervision* (form CR-300) is designed for use by supervising agencies to petition courts to revoke community supervision. The form includes instructions and all relevant information about hearings, the supervised person, conditions of

supervision, and the circumstances of the alleged violations. The form is also designed for use by courts to note probable cause determinations and issue related orders. The form is recommended for mandatory use to promote uniformity.

Comments, Alternatives Considered, and Policy Implications

The proposed rules and form were circulated for public comment on an expedited basis from August 1, 2011, to August 17, 2011. A total of 42 comments were received. Of those, 4 agreed with the proposal, 22 agreed with the proposal if modified, 12 did not specify a position, and 7 disagreed with the proposal. A chart providing all of the comments received and committee responses is attached at pages 16–119. The text of Penal Code section 3455 and attachments to specific comments are also provided after the comment chart.

Notable changes to rule 4.540 in response to comments

The committee revised proposed rule 4.540 in response to the following notable concerns:

- ***Evidence.*** As originally proposed, rule 4.540(g)(2) would have authorized the admission of hearsay and documentary evidence at revocation hearings without creating a right to confront witnesses. To address concerns that the rule failed to reflect certain limitations on the admissibility of hearsay and documentary evidence at current probation and parole revocation proceedings, the committee revised subdivision (g)(2) to require courts to apply the statutory and decisional laws that govern the admissibility of evidence at probation violation proceedings. The evidentiary standards applicable to probation proceedings are well-established, familiar to courts and other stakeholders, and adequately reflect constitutional limitations on the admissibility of hearsay and documentary evidence.

- ***Filing prerequisite.*** As originally proposed, rule 4.540(c)(2)(D) would have required supervising agencies to attempt to negotiate a disposition *before* filing the petition to revoke community supervision to ensure that petitions are not filed unnecessarily. In response to uncertainties about the statutory authority of the supervising agency to negotiate dispositions in excess of 10 days in county jail before a petition is filed, the committee deleted subdivision (c)(2)(D).

- ***Valdivia v. Schwarzenegger.*** In response to questions about whether courts are bound by the specific terms of an injunction and related orders issued in pending federal court litigation involving parole revocation procedures implemented by CDCR,[3] the committee added an advisory committee comment to clarify that the terms and orders do not apply to community supervision revocation procedure. The advisory committee comment also explains that the terms of the federal injunction and related orders represent a settlement between other parties regarding revocation procedures implemented by CDCR under a previous statutory scheme and are not expressly required by the federal Constitution.

[3] See, e.g., *Valdivia v. Schwarzenegger* (E.D.Cal., Dec. 2, 2010, Civ. No. S-94-0671 LLK/GGH).

Other notable changes

After further consideration, the committee also revised the rules and form as follows:

- ***Minimum contents of written reports***. To address concerns that compliance with the minimum contents of supervising agency reports under rule 4.541(b) as originally proposed are too burdensome, the committee deleted the requirement that reports include "all relevant information concerning the supervised person's social history, including family, education, employment, income, military, medical, psychological, and substance abuse information."

- ***Written findings.*** To ensure that courts properly memorialize the reasons for any revocations of community supervision, the committee added subdivision (i) to rule 4.540 to require courts to summarize—in writing or orally on the record—the evidence relied on and the reasons for the revocation.

- ***Subsequent reports.*** To relieve supervising agencies from preparing new written reports for subsequent proceedings involving the same supervised person, the committee added subdivision (c) to rule 4.541 to authorize supervising agencies to update previous reports.

- ***Victim notice.*** In addition to requiring supervising agencies to provide notice of any hearings to victims under rule 4.540(e), the committee added an advisory committee comment to specify that victims are separately entitled to notice under article I, section 28 of the California Constitution.

- ***Hearing deadline.*** In response to legislation enacted *after* the proposal circulated for public comment, the committee replaced the 45-day hearing deadline in rule 4.540(g)(1) with the following, which tracks the language of recently amended Penal Code section 3455(b): "The hearing on the petition for revocation must occur within a reasonable time after the filing of the petition."[4] The committee also added an advisory committee comment to encourage courts to consider whether the supervised person is detained when deciding a reasonable time for hearing.

- ***Form changes.*** The committee also revised the *Petition for Revocation of Community Supervision* (form CR-300) to require additional information, including the county of the underlying conviction and the supervised person's booking number.

The committee also added several advisory committee comments to the rules to explain particular provisions of the rules and made several nonsubstantive changes to the rules and form in response to suggestions as explained in the attached comment chart.

Notable alternatives considered

The committee considered but declined to amend the rules in response to the following concerns:

[4] ABX1 17 (Blumenfield), Stats. 2011, ch. 12.

- ***Probable Cause Determinations***. Although the realignment legislation does not expressly require probable cause determinations, to promote due process protections for supervised persons, proposed rule 4.540 requires two probable cause reviews. First, subdivision (c)(2)(A) requires the supervising agency to establish probable cause for the alleged violation before filing the petition. Second, subdivision (d) requires the court to separately review whether probable cause exists to support a revocation within five court days of the filing of the petition.

  The committee alternatively considered but declined to prescribe specific requirements regarding the manner in which supervising agencies and courts must determine probable cause. Instead, rule 4.540 is designed to provide courts with broad discretion to determine the most appropriate manner to review probable cause according to local practices. For example, some courts may wish to conduct formal hearings in the presence of the parties to review probable cause determinations made by supervising agencies, while other courts may decide that the probable cause determinations conducted by the supervising agencies before petitions are filed satisfy due process and only require informal court reviews outside the presence of the parties. To emphasize that rule 4.540 is designed to provide courts with broad discretion regarding probable cause reviews, the committee added an advisory committee comment to clarify that courts may determine the most appropriate manner to review the supervising agency's probable cause determination.

- ***Appointment of counsel***. The committee also considered but declined to amend rule 4.540 to require the appointment of defense counsel *before* the supervising agency determines probable cause. Under the criminal justice realignment legislation, supervising agencies are authorized to conduct certain violation proceedings *without* court involvement. (Pen. Code, § 3454(b) [Authorizing supervising agencies "to determine and order appropriate responses to alleged violation," including flash incarceration].) Although the committee agrees that supervised persons should be represented throughout all revocation-related proceedings, the committee declined to amend the rule to require the appointment of counsel at proceedings that are not within the purview of courts.

Future consideration

To ensure that the proposed rules and form adequately facilitate court implementation of the new statutory community supervision revocation process, the committee will monitor court implementation efforts in the coming months and will reevaluate whether additional or modified procedures are required.

Implementation Requirements, Costs, and Operational Impacts

The Judicial Council approved trial court budget allocations to implement criminal justice realignment legislation on August 26, 2011. Additional expected costs and operational impacts

related to this proposal include the production of a new form and any associated judicial and court staff training.

Attachments

1. Cal. Rules of Court, rules 4.540 and 4.541, at pages 8–14
2. Form CR-300, at page 15
3. Chart of comments, at pages 16–119
4. Attachment A: *Stipulated Order for Permanent Injunctive Relief* ("*Valdivia* Injunction"), attached as an exhibit to the comment from Rosen, Bien & Galvan, LLP, in item #27 of the attached comment chart
5. Attachment B: *Stipulation and Order on Revised Injunction* ("*Armstrong* Injunction"), attached as an exhibit to the comments from Rosen, Bien & Galvan, LLP, in item #27 of the attached comment chart
6. Text of Penal Code section 3455

Rules 4.540 and 4.541 of the California Rules of Court are adopted effective October 28, 2011, to read:

Division 6. Postconviction, Postrelease, and Writs

***

Chapter 2. ~~Habeas Corpus~~ Postrelease

Rule 4.540. Revocation of postrelease community supervision

(a) Application

This rule applies to petitions for revocation of postrelease community supervision under Penal Code section 3455.

(b) Definitions

As used in this chapter:

(1) "Supervised person" means any person subject to community supervision under Penal Code section 3451.

(2) "Court" includes any hearing officer appointed by a superior court and authorized to conduct revocation proceedings under Government Code section 71622.5.

(3) "Supervising agency" means the county agency designated as the supervising agency by the board of supervisors under Penal Code section 3451.

(c) Petition for revocation

(1) Petitions for revocation must be filed by the supervising agency at the location designated by the superior court in the county in which the person is supervised.

(2) The supervising agency may file a petition for revocation only after all of the following have occurred:

(A) The supervising agency has established probable cause to believe the supervised person has violated a term or condition of community supervision;

(B) The supervising agency has determined, following application of its assessment processes, that intermediate sanctions without court

intervention as authorized by Penal Code section 3454(b) are not appropriate responses to the alleged violation; and

(C) The supervising agency has informed the supervised person that he or she is entitled to the assistance of counsel and, if he or she desires but is unable to employ counsel, the supervising agency has referred the matter to the public defender or other person or agency designated by the county to represent supervised persons.

(3) Petitions for revocation must be made on *Petition for Revocation of Community Supervision* (form CR-300) and must include a written report from the supervising agency that includes the declaration and information required under rule 4.541.

(4) Upon filing the petition, the supervising agency must provide copies of the petition and written report to the prosecutor and the supervised person's counsel or, if unrepresented, to the supervised person.

(d) Probable cause review

(1) The court must review whether probable cause exists to support a revocation within five court days of the filing of the petition. To conduct the review, the minimum information the court may rely upon is the information contained in the petition and written report of the supervising agency. If the court determines that probable cause exists to support a revocation, the court must indicate the determination on *Petition for Revocation of Community Supervision* (form CR-300) and preliminarily revoke supervision.

(2) If the court determines that no probable cause exists to support the revocation, the court must dismiss the petition, vacate any scheduled hearings, and return the person to community supervision on the same terms and conditions. If the court dismisses the petition, the supervising agency must notify the prosecutor, supervised person, and supervised person's counsel, if any, of the dismissal.

(e) Notice of hearing

The supervising agency must provide notice of the date, time, and place of any hearing related to the petition to revoke to the supervised person, the supervised person's counsel, if any, the prosecutor, and any victims.

(f) Waiver

At any time before a formal hearing on the petition, the supervised person may waive, in writing, his or her right to counsel, admit a violation, waive a hearing, and accept a proposed modification of supervision.

(g) Formal hearing

(1) The hearing on the petition for revocation must occur within a reasonable time after the filing of the petition.

(2) Revocation determinations must be based on a preponderance of the evidence admitted at the hearing. The statutory and decisional law that governs the admissibility of evidence at probation violation proceedings applies.

(h) Orders After Hearing

(1) If the court finds that the supervised person has not violated a term or condition of supervision, the court must dismiss the petition and return the supervised person to community supervision on the same terms and conditions.

(2) If the court finds that the supervised person has violated a term or condition of supervision, the court may:

(A) Return the supervised person to supervision with modifications of conditions, if appropriate, including a period of incarceration in county jail;

(B) Revoke supervision and order the supervised person to confinement in county jail; or

(C) Refer the supervised person to a reentry court under Penal Code section 3015 or any other evidence-based program in the court's discretion.

(3) Any confinement ordered by the court under (h)(2)(A) or (B) must not exceed a period of 180 days in county jail.

(i) Findings

If the court revokes community supervision, the court must summarize in writing the evidence relied on and the reasons for the revocation. A transcript of the hearing that contains the court's oral statement of the reasons and evidence relied on may serve as a substitute for written findings.

Advisory Committee Comment

Before the enactment of criminal justice realignment legislation (Assem. Bill 109 (Committee on Budget), Stats. 2011, ch. 15; AB 117 (Committee on Budget), Stats. 2011, ch. 39; ABX1 17 (Blumenfield), Stats. 2011, ch. 12), parole revocation procedures conducted by the California Department of Corrections and Rehabilitation were subject to federal court injunction. (See *Valdivia v. Schwarzenegger* (E.D.Cal., Dec. 2, 2010, Civ. No. S-94-0671 LLK/GGH).) The terms and procedures required by the injunction represent a negotiated settlement between the parties and are not "necessary or required by the constitution." (*Valdivia v. Schwarzenegger* (9th Cir. 2010) 599 F.3d 984, 995, *cert. denied sub nom. Brown v. Valdivia* (2011) 131 S.Ct. 1626 [vacating a district court order denying the state's motion to modify the injunction to conform to recently enacted Penal Code section 3044 because "[t]here is no indication anywhere in the record that these particular procedures are necessary for the assurance of the due process rights of parolees"].) The due process standards applicable to postrelease community supervision revocation proceedings have been established by constitutional case law (see, e.g., *Morrissey v. Brewer* (1972) 408 U.S. 471, 489; *People v. Vickers* (1972) 8 Cal.3d 451, 457–458), not the terms and procedures negotiated by the parties to the federal injunction and related orders.

The Criminal Law Advisory Committee acknowledges that the practices related to the scheduling of court appearances vary from county to county. Nothing in this rule is intended to prohibit courts from scheduling court appearances according to local needs and customs, including requiring court appearances before formal evidentiary hearings on the petition to revoke. When filing a petition, petitioners should consult local rules and court staff regarding specific requirements for scheduling court appearances related to revocation petitions.

Subdivision (c). Penal Code section 3455 does not prescribe a deadline for filing the petition. It is incumbent on courts and supervising agencies to ensure timely filing of petitions, particularly when the supervised person is detained solely for a violation.

Subdivision (c)(2(A). Detained supervised persons are generally entitled to certain due process rights during revocation proceedings, including a preliminary probable cause determination. (See, e.g., *Morrissey*, *supra*, 408 U.S. at 489; *Vickers*, *supra*, 8 Cal.3d at 457–458.) Under the criminal justice realignment legislation, supervising agencies are authorized to conduct certain violation proceedings *without* court involvement. (Pen. Code, § 3454(b) [authorizing supervising agencies "to determine and order appropriate responses to alleged violations," including flash incarceration].) A supervising agency may only file a petition to revoke supervision with the court after it has determined, following application of its "assessment processes," that intermediate sanctions are not appropriate responses to a violation. (Pen. Code, § 3455(a).) Supervising agencies are also authorized to determine whether the supervised person should remain in custody pending a revocation hearing and may order the person confined pending a hearing. (Pen. Code, § 3455(b).) To promote supervising agency compliance with the due process rights of supervised persons during any proceedings conducted before the filing of the petition,

this subdivision requires the supervising agency to conduct a preliminary probable cause determination before the petition is filed with the court. Courts must independently review the supervising agency's probable cause determination under subdivision (d).

Subdivision (c)(2)(C). This subdivision is designed to ensure that indigent supervised persons who desire counsel are represented as early in the revocation proceedings as possible. Nothing in this subdivision is intended to infringe on court authority to appoint counsel or allow a supervised person to waive the right to counsel.

Subdivision (d). This subdivision requires courts to review the supervising agency's probable cause determination required under subdivision (c)(2)(A). Courts may determine the most appropriate manner to review the supervising agency's probable cause determination. Nothing in this subdivision is intended to prevent courts from conducting formal hearings to review probable cause.

Subdivision (e). Victims are separately entitled to notice as required under article I, section 28 of the California Constitution.

Subdivision (f). This subdivision is based on Penal Code section 3455(a): "At any point during the process initiated pursuant to this section, a person may waive, in writing, his or her right to counsel, admit the violation of his or her postrelease supervision, waive a court hearing, and accept the proposed modification of his or her postrelease supervision."

Subdivision (g). This subdivision is based on Penal Code section 3455(b): "The revocation hearing shall be held within a reasonable time after the filing of the revocation petition." When deciding a reasonable time for hearing, courts should consider whether the supervised person is detained. (See, e.g., *Morrissey*, *supra*, 408 U.S. at 488 [a hearing within two months of arrest may be appropriate under certain circumstances].)

Rule 4.541. Supervising agency reports

(a) Declaration

A petition for revocation of community supervision under Penal Code section 3455 must include a declaration signed under penalty of perjury that confirms that the requirements prescribed by rule 4.540(c)(2) have been satisfied.

(b) Minimum contents

Except as provided in (c), a petition for revocation of community supervision under Penal Code section 3455 must include a written report that contains at least the following information:

(1) Information about the supervised person, including:

(A) Personal identifying information, including name and date of birth;

(B) Custody status and the date and circumstances of arrest;

(C) Any pending cases and case numbers;

(D) The history and background of the supervised person, including a summary of the supervised person's record of prior criminal conduct; and

(E) Any available information requested by the court regarding the supervised person's risk of recidivism, including any validated risk-needs assessments;

(2) All relevant terms and conditions of supervision and the circumstances of the alleged violations, including a summary of any statement made by the supervised person, and any victim information, including statements and type and amount of loss;

(3) A summary of all previous violations and sanctions, including flash incarceration, and the reasons that the supervising agency has determined that intermediate sanctions without court intervention as authorized by Penal Code section 3454(b) are not appropriate responses to the alleged violations; and

(4) Any recommendations.

(c) Subsequent reports

If the supervising agency submitted a written report with an earlier revocation petition, a written report attached to a subsequent petition need only update the information required by (b). A subsequent report must include a copy of the original written report if the original report is not contained in the court file.

Advisory Committee Comment

Subdivision (b). This subdivision prescribes minimum contents for supervising agency reports required under Penal Code section 3455 and rule 4.540(c)(3). Courts may require additional contents in light of local customs and needs.

Subdivision (b)(1)(D). The history and background of the supervised person may include the supervised person's social history, including family, education, employment, income, military, medical, psychological, and substance abuse information.

Subdivision (b)(1)(E). Penal Code section 3451(a) requires community supervision to be consistent with evidence-based practices, including supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among supervised persons. "Evidence-based practices" refers to "supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under probation, parole, or postrelease supervision." (Pen. Code, § 3450(b)(9).)

Chapter 3. Habeas Corpus

SUPERVISING AGENCY *(Name and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):*	**DRAFT ONLY** ***Not approved by Judicial Council***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
IN THE MATTER OF *(name of supervised person)*: Date of birth:	
PETITION FOR REVOCATION OF COMMUNITY SUPERVISION	CDCR NUMBER, IF ANY: COURT/CASE NUMBER:

INSTRUCTIONS

- *Before filing this form, petitioner should consult local rules and court staff to schedule the hearing in item 1.*
- *Petitioner must provide notice of the date, time, and place for the hearing in item 1 to the supervised person, the supervised person's counsel, if any, the prosecutor, and any victims. (Cal. Rules of Court, rule 4.540(e).)*
- *Petitioner must attach a written report that contains the declaration and information required under rule 4.541.*
- *Upon filing the petition, petitioner must provide copies of the petition and written report to the prosecutor and the supervised person's counsel or, if unrepresented, the supervised person. (Cal. Rules of Court, rule 4.540(c)(4).)*

1. **HEARING INFORMATION:** A hearing on this petition for revocation has been scheduled as follows:

Date: Time: Location *(if different than court address above):*

If an interpreter is needed, please specify the language:

2. **CUSTODY STATUS:** *(Select one):* ☐ not in custody ☐ in custody *(specify location):*
   Booking number *(if any):*
3. **CONVICTION INFORMATION:**
   The supervised person was originally convicted of the following offenses:
   on (*specify date):* in case numbers *(specify):*
   in county of *(specify):* and sentenced to (*specify sentence):*
4. **SUPERVISION INFORMATION:** The supervised person was released on community supervision on *(specify date):*
   Name of current supervising agent or officer:
   Supervision is scheduled to expire on *(specify date):*
5. **SPECIFIC TERMS AND CONDITIONS:** Petitioner alleges that the supervised person has violated the following terms and conditions of community supervision *(if more space is needed, please use* Attachment to Judicial Council Form *(MC-025)):*
6. **SUMMARY:** The supervising agency established probable cause for the alleged violation on *(specify date):*
   The circumstances of the alleged violation are *(if more space is needed, please use* Attachment to Judicial Council Form *(MC-025)):*

I declare under penalty of perjury and to the best of my information and belief that the foregoing is true and correct.

Date: _____ By _____

NAME AND TITLE OF PETITIONER — SIGNATURE OF PETITIONER

COURT'S PROBABLE CAUSE FINDING AND ORDERS

The court *(select one)*:

☐ finds probable cause to support a revocation and preliminarily revokes supervision.

☐ does not find probable cause to support a revocation, vacates any hearing dates, and returns the supervised person to community supervision on the same terms and conditions. The supervising agency must notify the prosecutor, supervised person, and supervised person's counsel (if any) of the dismissal.

FOR COURT USE ONLY

Date: _____

JUDICIAL OFFICER

Form Adopted for Mandatory Use
Judicial Council of California
CR-300 [New October 28, 2011]

PETITION FOR REVOCATION OF COMMUNITY SUPERVISION
(Pen. Code, § 3455)

www.courts.ca.gov

SP11-14

Criminal Justice Realignment: Postrelease Community Supervision Revocation Procedure (adopt Cal. Rules of Court, rules 4.540 and 4.541, and form CR-300)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Advisory Committee Response
1.	American Civil Liberties Union of Northern California Mr. Allen Hopper Police Practices Director	NI	Proposed Rule 4.540(g)(2) provides that: "Revocation determinations must be based on a preponderance of the evidence admitted at the hearing, which may include documentary evidence, direct testimony, and hearsay. Admission of the recorded or hearsay statement of a witness must not be construed to create a right to confront the witness at the hearing." The [American Civil Liberties Union] is concerned that this blanket admissibility of hearsay at revocation hearings would violate the California Evidence Code and also due process. First, under Government Code [section] 71622.5, the hearing officers who will preside over the proceedings are appointed by the superior court and are thus subordinate judicial officers. (See Cal.Const. Art. 6, § 22.) All proceedings before such officers are governed by the provisions of the Evidence Code except as otherwise provided by statute, as would any such proceedings conducted by a judge or commissioner. (Evid. Code, § 300.) We are not aware of any statute that exempts these hearings from the Evidence Code, and thus the general prohibition against hearsay evidence must apply. Second, even if these proceedings were not governed by the Evidence Code, California courts have required that … hearsay must be	To address concerns that proposed rule 4.540 fails to account for certain limitations on the admissibility of hearsay and documentary evidence at parole and probation revocation proceedings, the committee has revised subdivision (g)(2) to state: "Revocation determinations must be based on a preponderance of the evidence admitted at the hearing. The statutory and decisional law that governs the admissibility of evidence at probation violation proceedings applies." The evidentiary standards that apply to probation proceedings are well-established, familiar to courts and other stakeholders, and adequately reflect constitutional limitations on the admissibility of hearsay and other evidentiary evidence. In addition, requiring courts to apply probation revocation evidentiary standards would eliminate confusion and promote uniformity and due process.

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Criminal Justice Realignment: Postrelease Community Supervision Revocation Procedure (adopt Cal. Rules of Court, rules 4.540 and 4.541, and form CR-300)
All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Advisory Committee Response
			treated with care before it provides grounds for revocation of probation or parole. (See *People v. Maki* (1985) 39 Cal.3d 707, 716.) Thus, even though, under Penal Code [section] 1203, the Evidence Code does not apply to probation-revocation hearings,[1] testimonial hearsay evidence may not be admitted unless the court finds good cause not to require live testimony. (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1200-03.) The proposed Rule would violate this well established constitutional standard for the admission of hearsay evidence in proceedings that may result in a person's incarceration. We would therefore request that subsection (g)(2) be modified accordingly. [1] As the 1965 Law Revision Commission Comment to Evidence Code [section] 300 specifically notes, Penal Code [section] 1203 is a "statute relaxing the rules of evidence" in probation revocation hearings.	
2.	Hon. Michael G. Bush Presiding Judge Superior Court of Kern County	NI	Proposed Rule 4.540(e) states: "The supervising agency must provide notice of the date, time and place of any hearing related to the petition to revoke to the supervised person, the supervised person's counsel, if any, the prosecutor, and any victims."	

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

SP11-14
Criminal Justice Realignment: Postrelease Community Supervision Revocation Procedure (adopt Cal. Rules of Court, rules 4.540 and 4.541, and form CR-300)
All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Advisory Committee Response
			• This proposed rule requires notice of ***any*** hearing. Certainly the parties need to be noticed of the ***initial*** hearing but thereafter they would be in court should the hearing be continued for any reason. It does not seem necessary that the supervising agency notice the parties about any further hearing given that the parties would be in court when the new dates are ordered. I recommend amending the proposed language by striking ***any*** and replacing it with ***the initial***. • The proposed rule refers to victims. It is not clear if this means any victims from the initial crime for which the defendant is being supervised, any victims from an act that is the basis of the petition to revoke, or both. This should be clarified. Thank you for your consideration.	• The committee declines the suggestion because courts are not required to schedule initial appearances. Instead, the rule authorizes courts to schedule court appearances according to local needs and customs. Requiring the supervising agency to provide notice of "any hearing" ensures adequate notice even though the scheduling of court appearances may vary from county to county. • Victim notice requirements—including a broad definition of the term "victim"—are separately prescribed by article I, section 28 of the California Constitution, as amended by Proposition 9, "The Victims' Bill of Rights Act of 2008," also known as "Marsy's Law." Although the constitution entitles victims to receive notice of certain parole proceedings, because the duty to provide notice to victims is widely considered a prosecutorial—not court—responsibility, the committee declines to amend the rule to include additional victim notice requirements. However, to promote compliance with constitutional notice requirements for victims, the committee

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				amended rule 4.540 to add the following advisory committee comment: "Victims are separately entitled to notice as required under article I, section 28 of the California Constitution."
3.	California Public Defenders Association Mr. John R. Abrahams Sonoma County Public Defender	N	The Judicial Council has proposed a new court rule which would permit the use of hearsay evidence at revocation of postrelease community supervision hearings: "Revocation determinations must be based on a preponderance of the evidence admitted at the hearing, which may include documentary evidence, direct testimony, and hearsay." (Proposed Cal. Rules of Ct., Rule 4.540(g)(2), emph. Added.) The California Public Defender's Association strongly opposes adoption of this rule and urges instead that a rule be adopted to bar admission of unconstrained hearsay at postrelease community supervision revocation hearings. The rules of evidence applicable to probation revocation hearings should also be the standard at postrelease community supervision hearings. At this time, parolees appear at hearings before Parole Board Commissioners who make the determination whether to revoke parole. In the future, these individuals will appear at postrelease community supervision hearings where revocation of supervision will be determined by bench officers who we anticipate	Please see the committee response to comment #1 above.

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			will be familiar with the rules of evidence as applied at probation hearings. It is logical to expect the bench officers to apply the same standards in the new postrelease community supervision hearings, and, in fact, it is counter-intuitive to expect them to apply different rules of evidence. If the proposed court rule is adopted as drafted, it would create unnecessary confusion between the two hearings, especially in cases where the same individual might be simultaneously on probation and parole. Bench officers and parolees would be hard pressed to parse the evidence in one hearing from the other and to keep track of what evidence is admissible only in the postrelease community supervision hearing, but not the probation hearing. Additionally, having two inconsistent standards would cause inconsistent results with the similar evidence leading to revocation of supervision in some cases and not others. The rules of evidence now in effect at probation hearings are well settled, standardized, and consistent. (See *People v. Abrams* (2007) 158 Cal.App.4th 396.) Adoption of the proposed court rule, which would allow for use of hearsay at postrelease community supervision hearings (Proposed Cal. Rules of Ct., Rule 4.540(g)(2)), would create complete chaos. The bench officer would have to determine, for example, what constitutes hearsay in the context of the hearing,	

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			whether a live postrelease community supervision agent would have to testify to hearsay, whether all documents are admissible, and whether there are any limits whatsoever on hearsay evidence. Parolees have had the protection of *Morrissey v. Brewer* (1972) 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484, in which the United States Supreme Court ruled that due process applies at parole hearings and extends to parolees "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)," while stating that "the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." (Id. at p. 489.) The Due Process Clause should preclude the unlimited use of hearsay at postrelease community supervision revocation hearings, and reports of an unknown or unreliable nature should not be permitted into evidence. The proposed rule, however, invites inconsistency; it seems inevitable that practices will vary in different counties and even different tribunals in the same county. This will surely lead to appellate litigation and an entire body of jurisprudence on what hearsay is admissible in postrelease community supervision revocation hearings, and what foundation for such hearsay is required.	

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			This uncertainty could be easily avoided by modifying the proposed court rule to provide that hearsay is admissible at postrelease community supervision revocation hearings only to the extent that it is admissible at probation revocation proceedings. If the rules of evidence at postrelease community supervision hearings were to mirror the rules of evidence at probation revocation proceedings, bench officers would be consistent in their rulings, there would be no confusion, and it would save court time. Identical rules of evidence in both kinds of hearings would also further the aims of the entire realignment scheme, including the goal of minimizing reincarceration on technical grounds. (Pen. Code, § 3450(b)(3) ["reincarceration of parolees for technical violations do[es] not result in improved public safety"].) If the proposed rule were adopted, wholesale admission of hearsay evidence would be allowed, resulting in revocations of supervision and reincarceration of many individuals who would not otherwise have been found in violation. For all of these reasons, we urge that the court rule not be adopted as proposed, and that instead of providing that "hearsay" is admissible at postrelease community supervision revocation hearings, the Rule of Court state, "Revocation determinations must be based on a	

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			preponderance of the evidence admitted at the hearing, which may include documentary evidence, direct testimony, and hearsay which would be admissible at probation revocation hearings." 	
4.	California Public Defenders Association Mr. Michael C. McMahon Chair, Amicus Committee	AM	• On behalf of the California Public Defender[s] Association and Stephen P. Lipson, the Public Defender of Ventura County, I write to comment on proposed rule 4.540. Although Realignment is new, with regard to due process protections, parole, probation, and supervised release revocation hearings are constitutionally indistinguishable and are analyzed in the same manner. The Due Process Clauses of the Fifth and Fourteenth Amendments provide minimum procedures the [s]tates must provide during revocation proceedings. Our comments reflect our assumption that many revocations will involve supervised persons who are in custody on a hold or on electronic in-home detention. We also believe that Realignment is intended and designed to get many of the supervised persons out of jail and into alternative placements in structured and supervised environments and self-help programs. We are also mindful of the Permanent Injunction imposed in the *Valdivia* case	• The specific terms of the federal court injunction and related orders in the *Valdivia* class action lawsuit do not expressly apply to community supervision revocation procedure. The terms of the injunction and related orders represent a settlement negotiation between other parties regarding revocation procedures implemented by the California Department of Corrections and Rehabilitation (CDCR) under a previous statutory scheme. To address questions about whether courts are bound by the specific terms of the injunction and related orders, the committee added the following advisory committee comment to rule 4.540: Before the enactment of criminal justice realignment legislation (Assem. Bill 109 (Committee on Budget), Stats. 2011, ch. 15; AB 117 (Committee on Budget), Stats. 2011, ch. 39; ABX1 17 (Blumenfield), Stats. 2011, ch. 12), parole revocation procedures conducted by the California Department of Corrections and

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			and the magistrate's subsequent Remedial Plan adopted and ordered by the District Court. (See *Valdivia v. Brown* (E.D. Cal. Apr. 20, 2011) 2011 U.S. Dist. LEXIS 51902.)	Rehabilitation were subject to federal court injunction. (See *Valdivia v. Schwarzenegger* (E.D.Cal., Dec. 2, 2010, Civ. No. S-94-0671 LLK/GGH).) The terms and procedures required by the injunction represent a negotiated settlement between the parties and are not "necessary or required by the constitution." (*Valdivia v. Schwarzenegger* (9th Cir. 2010) 599 F.3d 984, 995, *cert. denied sub nom. Brown v. Valdivia* (2011) 131 S.Ct. 1626 [vacating a district court order denying the state's motion to modify the injunction to conform to recently enacted Penal Code section 3044 because "[t]here is no indication anywhere in the record that these particular procedures are necessary for the assurance of the due process rights of parolees"].) The due process standards applicable to postrelease community supervision revocation proceedings have been established by constitutional case law (see, e.g., *Morrissey v. Brewer* (1972) 408 U.S. 471, 489; *People v. Vickers* (1972) 8 Cal.3d 451, 457–458), not the terms and procedures negotiated by the parties to the federal injunction and related orders.

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			• **Notice of Charges**: To provide due process, California must provide notice of the allegations to the supervised person, giving adequate information in sufficient time to prepare a defense. The *Valdivia* Permanent Injunction requirement reads: "If the hold is continued, the parolee will be served actual notice of rights, with a factual summary and written notice of rights, within 3 business days." (¶11(b)(iii).)	• Proposed rule 4.450(c)(4) would require supervising agencies to provide a copy of the *Petition for Revocation of Community Supervision* (form CR-300) to the supervised person's counsel or, if unrepresented, to the supervised person. Proposed form CR-300 separately requires supervising agencies to summarize the circumstances of the alleged violation. In conjunction, rule 4.540(c)(4) and form CR-300 are designed to ensure that supervised persons are provided adequate notice of the allegations.
			• **Probable Cause Hearings**: Probable cause hearings arguably are the core function protecting due process in the revocation process. To deliver on that promise, probable cause must be assessed — including whether there is evidence for each element of the violation, if argued—and a factual basis must be given for the findings. The supervised person is entitled to appear and be heard with counsel, as California has conceded in the *Valdivia* proceedings. Appointed counsel must have access to all non-confidential information possessed by the supervising agency and meet with the supervised person prior to the probable	• Although the criminal realignment legislation does not expressly require any probable cause determinations, to promote the due process rights of supervised persons, proposed rule 4.540 would require two probable cause reviews. First, subdivision (c)(2)(A) would require supervising agencies to establish probable cause *before* filing a petition to revoke. Second, subdivision (d)(1) would require courts to independently "review whether probable cause exists to support a revocation within five court days of the filing of the petition." The committee has also added the following advisory committee comments to explain the purpose of the

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			cause hearing.	proposed rule's probable cause requirements: **Subdivision (c)(2)(A).** Detained supervised persons are generally entitled to certain due process rights during revocation proceedings, including a preliminary probable cause determination. (See, e.g., *Morrissey*, *supra*, 408 U.S. at 489; *Vickers*, *supra*, 8 Cal.3d at 457–458.) Under the criminal justice realignment legislation, supervising agencies are authorized to conduct certain violation proceedings *without* court involvement. (Pen. Code, § 3454(b) [authorizing supervising agencies "to determine and order appropriate responses to alleged violations," including flash incarceration].) A supervising agency may only file a petition to revoke with the court after it has determined, following application of its "assessment processes," that intermediate sanctions are not appropriate responses to a violation. (Pen. Code, § 3455(a).) Supervising agencies are also authorized to determine whether the supervised person should remain in custody pending a revocation hearing and may order the person confined pending a hearing. (Pen. Code, §

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				3455(b).) To promote supervising agency compliance with the due process rights of supervised persons during any proceedings conducted before the filing of the petition, this subdivision requires the supervising agency to conduct a preliminary probable cause determination before the petition is filed with the court. Courts must independently review the supervising agency's probable cause determination under subdivision (d). … **Subdivision (d).** This subdivision requires courts to review the supervising agency's probable cause determination required under subdivision (c)(2)(A). Courts may determine the most appropriate manner to review the supervising agency's probable cause determination. Nothing in this subdivision is intended to prevent courts from conducting formal hearings to review probable cause.
			• **Formal Hearings**: We contend that timely and final formal hearings should be conducted earlier than the 45 days deadline established in the proposed rule. Assuming the supervised person earns their 50% conduct credits, he will have served 90 of the maximum 180	• As originally circulated, proposed rule 4.540(g)(1) would have required courts to conduct formal revocation hearings no later than 45 days after the filing of the petition. However, realignment legislation enacted *after* the proposed rule circulated for public comment (ABX1 17

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			days in custody by day 45. This leaves little incentive for a person to commit to a supervised program, rather than just serving any additional custody time in jail. An earlier deadline would comport with the stated objectives of Realignment. Other modifications are needed to avoid conflicts with well-established decisional law and over-simplification of nuanced areas of constitutional law governing post-release supervision revocation procedures. • We recommend that the proposed rule be modified to refer to "trustworthy and reliable hearsay." This would remind the participants that admission of hearsay which does not bear a substantial degree of trustworthiness violates due process. (*People v. Brown* (1989) 215 Cal.App.3d 452, 454.) The current wording could easily be interpreted to allow the admission of hearsay, without a judicial assessment of its reliability. We also recommend the rule be modified to state that "the supervised person has the right to confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." (*Morrissey v. Brewer* (1972) 408 U.S.	(Blumenfield), Stats. 2011, ch. 12) amended Penal Code section 3455(b) to specify that the revocation hearing must occur within a "reasonable time" after the petition is filed. Accordingly, the committee revised subdivision (g)(1) to state: "The hearing on the petition for revocation must occur within a reasonable time after the filing of the petition." The committee also added an advisory committee comment to encourage courts to consider the supervised person's custody status when deciding a reasonable time for hearing. • Please see the committee response to comment #1 above.

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			471, 489; *United States v. Comito* ((9th Cir. 1999) 177 F.3d 1166, 1170.) Under the *Valdivia* judgment and Permanent Injunction, good cause requires hearing officers to "weigh the [parolee's] interest in his constitutionally guaranteed right to confrontation against the Government's good cause for denying it" before admitting hearsay evidence at a parole revocation hearing. (Ibid.) The current wording appears to create a rule disfavoring confrontation. The proposed modifications more accurately summarize the controlling rules of evidence and procedure, and are less likely to cause error and avoidable litigation.	
5.	Chief Probation Officers of California Ms. Karen Pank Executive Director	AM	The requirement in [rule] 4.540(c)(2)(D) that the supervising agency propose a sanction that is rejected by the supervised person before being able to file a petition to revoke fails to take into account offenders that fail to appear for appointments/refuse to be supervised, offenders that have committed a new offense where revocation in lieu of proceeding on the new offense may be appropriate, or situations where court intervention is deemed necessary. In addition, it appears that an agreement between the offender and supervising agency for more than 10 days incarceration would be beyond the scope of the supervising agency's	Agreed. The committee deleted subdivision (c)(2)(D) in light of the uncertainties about the statutory authority of supervising agencies to negotiate dispositions in excess of 10 days in county jail before a petition is filed. In addition, the remaining filing prerequisites prescribed in subdivision (c)(2)(A)–(C) sufficiently ensure that supervising agencies will exhaust all available alternatives before filing a petition.

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			authority. It seems that [rule] 4.540(c)(2)(D) is unnecessary since (c)(2)(B) eliminates frivolous petitions to revoke and a resolution short of a revocation hearing can still take place after the petition to revoke has been filed.	
6.	Hon. John Conley Superior Court of Orange County	NI	I am a judge on the Orange County's Superior Court's Felony Trial panel and have been involved with California criminal law since 1972. Here are my comments: • **Rule 4.540(d) Probable Cause Review**. It would be better if the rule explicitly stated "To conduct this review the court shall rely on any information contained in the written petition and written report of the supervising agency. The supervised person and/or his/her counsel shall have no right to be present." Unless this is stated very clearly, counsel and defendant[s] will request to be present, to call witnesses named in the report to cross examine them, etc. The rule must make it clear that this review is not like a felony preliminary hearing nor an SVP preliminary hearing, which it sounds like. It is a review of documentation and need not be calendared in the courtroom. Defendant need not be transported, and both attorneys do not need to be present. I[f] this is made clear at the outset, it will	• Detained supervised persons are generally entitled to certain due process rights during revocation proceedings, including a preliminary probable cause determination. Rule 4.540(c)(2)(A) requires the supervising agency to conduct a preliminary probable cause determination before the petition is filed. Rule 4.540(d) is designed to provide courts with broad discretion to determine the appropriate manner to review supervising agency probable cause determinations. For example, some courts may wish to conduct formal hearings in the presence of the parties to review probable cause determinations made by supervising agencies, while other courts may decide that the probable cause determinations conducted by the supervising agencies before petitions are filed satisfy due process and only require informal court reviews outside the

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			head off much future litigation.	presence of the parties. To emphasize that rule 4.540 is designed to provide courts with broad discretion regarding probable cause reviews, the committee added the following advisory committee comment: "This subdivision requires courts to review the supervising agency's probable cause determination required under subdivision (c)(2)(A). Courts may determine the most appropriate manner to review the supervising agency's probable cause determination. Nothing in this subdivision is intended to prevent courts from conducting formal hearings to review probable cause."
			• **Rule 4.541(b) Supervising Agency Reports, Minimum Contents**. The proposed [sub]section (b) of Rule 4.541 includes a huge array of information the Supervising Agency report is to contain at a minimum, e.g.[,] "social history, family, education, employment, income, military, medical, psychological and substance abuse information." This array of information seems similar to a full fledged probation report (average length in our county is about 20-30 pages). Why is so much information really necessary? It would appear that the court would have the court file for the defendant's most recent prison commitment available in nearly all	• To address concerns that compliance with the minimum contents of supervising agency reports under rule 4.541(b) are too burdensome, the committee deleted the requirement that reports include "all relevant information concerning the defendant's social history, including family, education, employment, income, military, medical, psychological, and substance abuse information." In addition, the committee added an advisory committee comment to clarify that the above information is optional. The committee also added subdivision (c), which authorizes supervising agencies to update previous reports for subsequent petitions involving the same supervised

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			cases [parolees are usually paroled to the county which they were sentenced from]. By contrast in our probation violation calendar the petition is usually 1-2 pages long with maybe a 1-2 page attachment. We should not make the parole revocation process unnecessarily elaborate, in my view. A probation violation can result in many years in state prison. Parole violations handled on the local level have a 6 month maximum. There is no reason that time consuming reports are necessary.	person. The remaining report requirements, however, are necessary for the proper adjudication of the revocation proceedings.
7.	County of San Diego Chief Administrative Office—Office of Strategy and Intergovernmental Affairs Ms. Amy Harbert Legislative Policy Advisor	AM	Thank you for the opportunity to review and comment …. We recommend that the regulations indicate that if a probation department has a Pre-Sentence Investigation (PSI) report, the department may submit a copy of the report to the local court to meet the minimum content requirements of Rule 4.541. In addition, we recommend that the regulations indicate that if probation is not present at the time of sentencing or in the situation of an immediate sentencing, a report similar to a probation revocation report could be considered to suffice the minimum content requirements of Rule 4.541. We agree with the proposed changes if modified as mentioned above….	The committee declines the suggestions because presentence reports would not (a) provide current information about the supervised person; (b) contain any information about the alleged violations, previous violations and sanctions, and any recommendations; and (c) be readily available to courts that did not conduct the underlying conviction. However, please see the committee response to the related suggestion in item #6 above, which explains how the rule has been amended to relieve supervising agencies of some of the burdens associated with producing reports.

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8.	Hon. J. Richard Couzens (Ret.) Superior Court of Placer County	AM	Penal Code [s]ection 3455(a) provides legislative direction on postrelease supervision revocation proceedings and specifies: "At any point during the process initiated pursuant to this section, a person may waive, in writing, his or her right to counsel, admit the parole violation, waive a court hearing, and accept the proposed parole modification." The language quoted above is poorly drafted. It is copied almost verbatim from a similar provision applicable to parole revocation proceedings to be heard by revocation hearing office[r]s after July 1, 2013[,] which explains the inadvertent use of the word "parole" rather than "postrelease supervision." The concept is borrowed from a provision in Penal Code section 1203.2(b) which authorizes a probationer to waive counsel and hearing on a petition to modify probation and stipulate to "the specific terms of a proposed modification" of probation to resolve the proceedings. Although section 3455(a) purposefully does not authorize the supervising agency to initiate a petition to modify the terms and conditions of supervision, section 3455(a)(1) explicitly authorizes the revocation hearing officer, upon finding a violation, to "return the person to parole [sic] supervision with modifications of conditions, if appropriate, including a period of incarceration in county jail." The statute thus clearly and appropriately authorizes an offender to resolve a petition to revoke post release supervision by waiving right to counsel and	

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			hearing, admitting the violation, and accepting a proposed modification of conditions including a period of incarceration in lieu of revocation. Subdivision (a) of section 3455 also directs the Judicial Council "to adopt forms and rules of court to establish uniform statewide procedures to implement this subdivision, including the minimum contents of supervision agency reports." In several respects proposed Rule 4.540 does not appear to faithfully implement section 3455(a). • First, the statute authorizes the offender to resolve the issue of revocation "at any point during the process initiated pursuant to this section." The process initiated by section 3455 is the postrelease supervision revocation process. Yet nowhere in the proposed rule is there any mention of this provision of the statute. Subdivision (f) of the proposed rule authorizes the supervised person to waive a hearing and admit a violation but makes no mention of the authority of the offender to also waive counsel and accept a proposed modification of the conditions of supervision to resolve the matter. • Second, paragraph (c)(2)(D) of the proposed rule prohibits the supervising agency from filing a petition for	• The committee has amended subdivision (f) to state: "At any time before a formal hearing on the petition, the supervised person may waive, in writing, his or her right to counsel, admit a violation, waive a hearing, and accept a proposed modification of supervision." The committee also added an advisory committee comment to clarify that subdivision (f) is based on Penal Code section 3455(a). • Subdivision (c)(2)(D) has been deleted. Please see the advisory committee response to the comment in item #5

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			revocation until the agency has proposed a sanction in response to the alleged violation and the supervised person has denied the violation and "declined to accept the proposed sanction and waive a court hearing as authorized by Penal Code section 3455(a)." This provision is contrary to section 3455(a) in several respects. First, the statute refers to a proposed "modification" not a proposed "sanction" and the proposed modification does not have to consist solely of a sanction. More important, the statute allows the supervised person to waive his rights, admit a violation, and accept a proposed modification at any point during the proceedings and does not require the supervised person to do so before the petition is filed and before the person has consulted with counsel. Section 3455(a) requires the agency to determine that intermediate sanctions are not appropriate before filing the petition, as referenced by paragraph (c)(2)(B) of the proposed rule, but it does not require—and it is a little incongruous to require—that a modification of the conditions of supervision be proposed, that the supervised person be compelled to deny the violation, and to decline to waive a hearing and to decline to accept the	above.

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			proposed modification, all as pre-conditions to filing the petition. • A better approach is that taken by proposed rule 4.541(b)(4) which requires only that the written report filed by the supervising agency along with the petition contain information about any "sanctions proposed by the supervising agency in response to the alleged violation before the filing of the petition but rejected by the supervised person." The proposed provision might be modified as follows: "Any recommended sanctions and other modifications, and a summary of sanctions and modifications proposed by the supervising agency in response to the alleged violation before the filing of the petition and whether the proposed sanctions and modifications were accepted but rejected by the supervised person." Three final suggestions: • The reference to subdivision "(A)" in proposed rule 4.541(a) should be deleted; • The reference to "parole" in paragraphs 4 and 5 of the Petition Form should be deleted.	• The committee declines the suggestion as unnecessary because the report requirements of rule 4.541(b)(3)—which require the supervising agency to summarize all previous violations, sanctions, and reasons why it has determined that intermediate sanctions without court intervention are not appropriate responses to the alleged violation—provide courts with sufficient information about all supervising agency activities before the filing of the petition. • Agreed. The reference to subdivision "(A)" in rule 4.541(a) is a typographical error. • Agreed. The references to "parole" in form CR-300 are typographical errors.

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			• Rule 4.541(b) specifies "minimum contents" in written reports submitted by supervising agencies along with petitions to revoke post-release supervision. Paragraph (1) of the proposed rule references "information about the supervised person" and goes on in subdivision (e) to require the kinds of things contained in the current rule re[garding] [presentence reports]: social history, military, etc. It's odd that we are looking into changing the contents of [presentence reports] to be more evidence-based, and at the same time mandating more old-fashioned supervision reports, especially where the post-release supervision statute is all about recidivism reduction with this population. With this population of offenders coming out of prison that was formerly supervised by parole and now supervised by probation, there may often be [California Department of Corrections and Rehabilitation] "COMPAS" or other probation department risk-needs assessment information in the file. Rule 4.541(b)(1) should be modified to include in subdivision (e) any validated risk needs assessment or other similar information pertaining to the supervised person's risk of recidivism.	• Agreed. The committee amended subdivision (b)(1)(e) to require that supervising agency reports include "any available information requested by the court regarding the supervised person's risk of recidivism, including any validated risk-needs assessments." To clarify the purpose of the amendment, the committee also added the following advisory committee comment: "Penal Code section 3451(a) requires community supervision to be consistent with evidence-based practices, including supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among supervised persons. 'Evidence-based practices' refers to "supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under probation, parole, or postrelease supervision.' (Pen. Code, § 3450(b)(9).)"

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9.	Mr. William Crisologo Attorney at Law	AM	• The provision in Rule 4.540(g)(2), the language of which was taken from Penal Code [section] 3044(a)(6), implies preclusion of a supervised person's due process confrontation rights granted in *Morrissey v. Brewer* (1972) 408 U.S. 471. The right to confront and cross-examine adverse witnesses at a revocation hearing embraces the right to cross-examine the author of the report on which the threatened revocation is predicated. (*In re Carroll* (1978) 80 Cal.App.3d 22.) However, the process should be flexible enough to consider evidence, including letters, affidavits, and other material, that would not be admissible in an adversary hearing. (*Morrissey v. Brewer, supra*.) Determining the admissibility of hearsay at a revocation hearing requires the right to confrontation against the good cause the government shows to excuse that right; as the significance of the evidence to the ultimate finding increases, so does the importance of the right of confrontation. (*In re Miller* (2006) 145 Cal.App.4th 1228.)	• Please see the advisory committee response to comment #1 above.
			• As the invitation to comment includes comment on the applicability of [Marsy's] Law, it would appear that (constitutional) provisions of this law	• Please see the advisory committee response to the related comment in item #2 above.

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			are applicable to post release supervision revocation proceedings. A victim has the right to reasonable notice of all public proceedings, including delinquency proceedings, upon request, at which the defendant and the prosecutor are entitled to be present and of all parole or other post-conviction release proceedings, and to be present at all such proceedings.	
10.	Hon. Becky Dugan Superior Court of Riverside County	AM	New proposed Rule of Court 4.540 requires a finding of probable cause be made for a submitted Petition for Revocation within five [court] days. I do not find this requirement in [Penal Code section] 3455. If it is not required by statute, we should not be requiring it. We do not now require [probable cause] findings for Probation Revocation Petitions. This would increase work load unnecessarily on our already burdened courts.	The committee disagrees. Although the criminal realignment legislation does not expressly require probable cause determinations, such determinations are necessary to protect the due process rights of supervised persons.
11.	Hon. Laurie Earl Assistant Presiding Judge Superior Court of Sacramento County	NI	• Community supervision is remarkably similar to parole and in 2013 courts will be conducting true parole revocation hearings. It would be helpful if courts had one procedure for handling all of these hearings. In light of such it would seem to be reasonable to follow the procedures developed in the settlement agreement of *Valdivia v. Schwarzenegger* and the law pronounced in *Morrissey v. Brewer*	• The committee agrees that a single procedure applicable to both community supervision and parole revocation proceedings would be helpful and efficient. To the extent possible, the committee hopes to apply the proposed rules and form to parole revocation proceedings in time for the July 1, 2013, effective date. For information regarding whether the terms of *Valdivia* settlement agreement applies to community

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			(1972) 408 U.S. 471, which identified due process requirements for parole revocation hearings. • **Re[garding rule] 4.540(d) and (g):** Proposed [rule 4.540] (d) [and] (g) define the time frames in which a probable cause (PC) and formal hearing must be held. The proposed rules rely on the "filing of the petition" to trigger the time frames. Sub[division] (d) provides that a court must make a PC determination within 5 [court] days of the filing of the petition and subsection (g)(1) provides that a formal hearing must be heard no later than 45 days after the date the petition if filed. The current time frames for parole revocation hearings, including PC hearings are governed by the *Morrissey*, *supra*, case and the *Valdivia* settlement agreement. Those cases rely on the date a hold is placed upon a parolee rather than the proposed date the petition is filed, to trigger these time frames. These cases hold that a PC hearing shall be held within 10 business days of the hold and a formal hearing within 35 days of the hold. Unless we are treating these hearings differently than parole revocation hearings, why wouldn't we use the same time frames approved in *Valdivia* rather than re-invent the wheel	supervision revocation procedure, please see the advisory committee response to the related comment in item #4 above. • For information regarding whether the *Valdivia* settlement agreement applies to community supervision revocation procedures, please see the advisory committee response to the related comment in item #4 above.

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			and risk litigation? • **Re[garding rule 4.540(e)]**: Proposed [rule 4.540(e)] states that the supervising agency must provide notice of the date, time and place of any hearing. It would be helpful in reducing challenges to the notice requirement if this [rule] required "written" notice. I suggest (e) read as follows: "The supervising agency must provide written notice of the date, time, and place of any hearing..." • **Re[garding rule 4.540(g)(2)]**: Due process under the 14th Amendment guarantees that persons facing revocation hearing[s] have a right to cross-examine adverse witnesses. This right can be denied only for good cause (*Morrissey, supra*). The nature of the confrontation right should be delineated in this rule. • **Re[garding rule 4.540(h)]**: *Morrissey, supra*, requires a written decision or a hearing transcript. (*People v. Ruiz* (1975) 53 Cal.App.3d 715.) Having handled habeas corpus challenges to revocations, it is extremely helpful for the reviewing court to have a list of objections made and the rulings on the objections. Given that hearing	• The committee declines to specifically require written notice as unnecessary. In addition, under rule 4.540(c)(4), the supervising agency is required to provide copies of the petition, which includes information regarding the date, time, and place of the hearing, to the supervised person's attorney or, if unrepresented, to the supervised person. • Please see the advisory committee response to the comment in item #1 above. • The committee agrees that written findings or an available hearing transcript is constitutionally required. Accordingly, the committee amended rule 4.540 to add subdivision (i): "If the court revokes community supervision, the court must summarize in writing the evidence relied on and the reasons for the revocation. A transcript of the hearing that contains the

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			transcripts could prove costly, the rule should require a written decision that includes objections made, and rulings on the objections. • **Re[garding] Proposed Judicial Council form for Petition for Revocation o[f] Community Supervision**: It would be helpful if the form contained a provision indicating that the supervised person was served with or provided notice of the petition, including the date of service/notice, how service was made, and by whom. Regarding Item #3, Conviction Information - it would be helpful to include a line that depicts the county of conviction.	court's oral statement of the reasons and evidence relied on may serve as a substitute for written findings." • The committee declines the suggestion because written proof of service requirements are too burdensome. The committee agrees, however, that information about the county of conviction would be helpful. The committee revised item 3 on form CR-300 to require the supervising agency to note the county of conviction for the case that resulted in the underlying prison commitment.
12.	First District Appellate Project, Appellate Defenders, Inc., Central California Appellate Program, and Sixth District Appellate Program Mr. J. Bradley O'Connell Assistant Director Mr. Matthew Zwerling Executive Director	NI	The First District Appellate Project (FDAP), Appellate Defenders, Inc. (ADI), the Central California Appellate Program (CCAP), and the Sixth District Appellate Program (SDAP) jointly submit these comments on … the proposed rules for judicial hearings for "revocation of postrelease community supervision" under the Criminal Justice Realignment legislation. In view of the shorter-than-usual comment period for these rules, we have *not* attempted to	Please see the advisory committee response to the comment in item #1 above.

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			review the new legislation in its entirety, nor have we reviewed the proposed rules in depth. Instead, we are confining this comment to a single provision which, if adopted in its current form, would pose significant constitutional problems for these hearings - the unlimited use of hearsay. Proposed rule 4.540(g)(2) provides: "Revocation determinations must be based on a preponderance of the evidence admitted at the hearing, which may include documentary evidence, direct testimony, and hearsay. Admission of the recorded or hearsay statement of a witness must not be construed to create a right to confront the witness at the hearing." In its current form, proposed rule 4.540(g)(2) appears to authorize admission of "documentary evidence" and other "hearsay," without limitation. By its reference to "the recorded or hearsay statement of a witness," the rule appears to contemplate admission of police interviews and other out-of-court statements of complainants and other percipient witnesses to an alleged violation. Moreover, the rule explicitly admonishes that there is no "right to confront the witness at the hearing." Although Penal Code section 3044(a)(5) seemingly provides for use of hearsay in parole revocations, judicial decisions have	

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			substantially curtailed the admission of such evidence under constitutional principles. Under the due process clause, a parolee does have a right "to confront and cross-examine adverse witnesses" at a revocation hearing "unless the hearing officer specifically finds good cause for not allowing confrontation." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 489.) Although that due process-based right is more limited than the Sixth Amendment confrontation right applicable in a trial, it does impose substantial limitations on admission of hearsay at revocation hearings, especially statements of percipient witnesses to the alleged violation. Both state and federal decisions have explicitly limited the use of hearsay in California parole revocations. (*In re Miller* (2006) 145 Cal.App.4th 1228, 1235-1242; *Valdivia v. Schwarznegger* (9th Cir. 2010) 599 F.3d 984, 989-993; see also *People v. Arreola* (1994) 7 Cal.4th 1144 [similar limits on probation revocations].) Those decisions require a court or other hearing officer to conduct a case-by-case assessment, which weighs the parolee's confrontation right against the state's asserted "good cause" for dispensing with confrontation. The case law places particular emphasis on whether the statement is of a type which carries strong indicia of reliability and "'bears a substantial guarantee of trustworthiness,'"	

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			(*Miller*, 145 Cal.App.4th at 1237), as well as on the importance of the hearsay to the principal factual issues of the charged violation. "The balancing test hinges on the importance of the hearsay evidence to the finder-of-fact's ultimate finding and the nature of the facts to be proven by the hearsay evidence. As the significance of the hearsay to the ultimate finding increases, so does the importance of the parolee's confrontation right." (*Miller* at 1236.) Under those authorities, "unsworn verbal statements" of witnesses to the alleged violation are particularly suspect, because these represent "'the least reliable type of hearsay.'" (*Miller* at 1238.) "[T]he need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness's demeanor." (*Arreola*, 7 Cal.4th at 1157.) Proposed rule 4.540(g)(2) does not reflect any of these constitutional limitations on use of hearsay in revocation hearings. It appears to invite revocation courts to admit "recorded or hearsay statement[s]" of percipient witnesses, without conducting the case-by-case assessment mandated by *Miller*, *Valdivia*, *Arreola* and other cases. Moreover, the express admonishment that admission of such hearsay "must not be construed to create a right to confront the witness at hearing" suggests that a court might even bar the defense from subpoenaing and calling those witnesses.	

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			In sum, if adopted [in] its current form, proposed rule 4.540(g)(2) would almost certainly bring these judicially-conducted revocation hearings into conflict with both state and federal decisions, recognizing a due process right to confront adverse witnesses. For these reasons, we urge the Council to delete the references to admission of hearsay from proposed rule 4.540(g)(2). Thank you for the opportunity to comment on these proposed rules.	
13.	Hon. Beth Freeman Presiding Judge Superior Court of San Mateo County	NI	As the Presiding Judge of the San Mateo County Superior Court, I have the following comments on proposed [rule] 4.540: • I would like to see the Rule amended to provide that the hearing officer (assuming that the person is not a judge or commissioner, but rather an attorney) be authorized to administer oaths without the necessity of appointing the hearing officer as a judge pro tem. • I would like to see the Rule provide that either no verbatim recording is required at any stage of the parole revocation process or to authorize audio recording.	• Hearing officer authority has been established by the Legislature under newly added Government Code section 71622.5. The committee declines to recommend expanding that authority by rule of court. • The committee declines the suggestion because use of electronic recording in criminal proceedings is separately governed by statute. (See, e.g., Gov. Code, § 69957.)

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			• I would like to see the Rule provide that hearing officers (again, attorneys appointed as hearing officers) are authorized to make probable cause determinations. The proposed form shows a signature line for the hearing officer, but that does not answer the question of the attorney/hearing officer's authority. My concern is that the trial courts be able to fully utilize the statutory authority to hire and use the services of an attorney serving as hearing officer with no restrictions. I recognize that warrant authority ([i]f authorized by the Legislature) would be a judicial function that only judges could fulfill. I would like to see the Rule or further amendments to the statute address these technical issues.	• Rule 4.540 applies to "courts," which subdivision (b)(2) defines to include "any hearing officer appointed by a superior court and authorized to conduct revocation proceedings under Government Code section 71622.5." In addition, the Legislature recently amended Penal Code section 3455(a) to expressly authorize hearing officers to issue warrants: "… [A] court *or its designated hearing officer appointed pursuant to Section 71622.5 of the Government Code* shall have authority to issue a warrant…" (Italics added.)
			• I support the proposed Rule with these modifications. I believe that the trial courts cannot thoroughly evaluate the proposed rule's sufficiency until we gain some experience in handling parole revocation hearings. I can foresee the need within one year to re-evaluate the rule based on such experience.	• Agreed. The committee will monitor court implementation efforts in the coming months to evaluate the need for additional or modified procedures.
14.	Fresno County Probation Department Mr. Rick Chavez Division Director	N	I have some concerns with the proposed changes as outlined under [rules] 4.540 and 4.541.	

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

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	Adult Probation Services		• Although it is clear that some type of procedure related to parole violations is necessary, this is not the case with post release violations. The current process that is in place regarding Violations of Probation (VOP) would appear to be sufficient. There has never been a need to file a Supplemental Petition nor has there been a need to essentially resubmit a majority of the information contained in the original sentencing report. Why can't the VOP process be replicated for the post release offender? I am not clear as to the benefits of the proposals. Implementation will impose an unrealistic work demand on an already overburdened and understaffed adult probation system. I cannot imagine local Courts would welcome the increase in paperwork that would accompany the expanded violation reports. [Regarding proposed rule 4.540]: • [Subdivision](c)(2)(C): There is presently no mechanism in place to refer the matter to the public defender absent the referral made by the Court at the time of the hearing. • [Subdivision](c)(3): There is no need	• Please see the advisory committee response to the related comment in item #6 above. • The precise manner in which supervising agencies will refer matters to the public defender before filing petitions will vary from county to county in accordance with local needs and customs. • The form and report requirements under

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			for a Supplemental Petition (form CR-300). Locally, when an offender is booked into jail by a probation officer, a remand form with all of the necessary information is submitted and that form is forwarded to the Court. The matter is set on calendar and a violation report is prepared. It appears this proposal would also require the violation report to be submitted at the same time the petition is filed.	rule 4.541 are necessary for the proper adjudication of the revocation proceedings. Penal Code section 3455(a)(1) also specifically requires the Judicial Council to adopt rules of court to prescribe the minimum contents of supervising agency reports.
			• [Subdivision](c)(4): Is it necessary to expect the report to be available at the time the petition is filed, especially given what is proposed as to the contents of the report?	• The report information is required upon filing the petition to promote early dispositions and avoid unnecessary hearings.
			• [Subdivision](e): We do not presently provide notice as is done in the juvenile system. [District attorneys, public defenders], and other agencies, including probation, have access to the calendar and run their own copies and prepare their cases based upon that information. As with the supplemental petition, there seems to be some willingness to replicate some of the juvenile process into the adult system.	• Rule 4.540(e) is designed to ensure that notice is properly provided to all relevant parties even though local practices may vary.
			• [Subdivision](g)(1): I assume the 45 day time frame corresponds to out of custody hearings. If the offender is	• The 45-day deadline for hearings has been deleted as explained in the advisory committee response to the related

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			detained, the current 48 hour time frame remains. Otherwise, this would create jail crowding. [Regarding proposed rule] 4.541: • [Subdivision](b)(1): Only the essential information needed by the Court [in] (a), (b) and (c) should be included in the report. Everything listed under (d) and (e) is already provided in the original sentencing report which is part of the Court file. • [Subdivisions](b)(2), (3) and (4): I assume there will be maximum flexibility on how this information is presented.	comment in item #4 above. • Please see the advisory committee response to the related comment in item #6 above. In addition, original sentencing reports may not be available because revocation petitions may be filed in a county other than the county of conviction. • Rule 4.541 only prescribes minimum contents for supervising agency reports. The format and design of the reports is the purview of local courts and supervising agencies.
15.	Mr. Jose Guillen Court Executive Officer Superior Court of Sonoma County	A	Some thought should be given to require the agency (probation) to provide proof of service (first class mail to last known address) of hearing date prior to issuance of bench warrant.	The committee declines to require written proof of service requirements as unnecessarily burdensome.
16.	Humboldt County Probation Department Mr. Shaun Brenneman Director	NI	The form and the rules do not account for [persons under community supervision] who abscond from supervision. There needs to be a mechanism for summarily revoking supervision, tolling their period of supervision and issuing a warrant. Failure to provide for this eventuality would allow offenders to essentially run away	The committee declines the suggestion because legislation enacted after this proposal circulated for public comment added Penal Code section 3455(d) to authorize the tolling of supervision and added Penal Code section 3455(a)(4) to authorize the issuance of warrants.

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			from their sentence.	
17.	Humboldt County Probation Department Mr. William Damiano Chief Probation Officer	AM	There needs to be a mechanism built into the violation petition that allows the supervising agency to request the issuance of a warrant for absconders. I realize it is a new animal, but some clarification regarding the tolling of time for [community supervision] offenders with a petition filed would also be helpful, if possible.	The committee declines the suggestion because legislation enacted after this proposal circulated for public comment added Penal Code section 3455(d) to authorize the tolling of supervision and added Penal Code section 3455(a)(4) to authorize the issuance of warrants.
18.	Mr. Ronald L. Brown Los Angeles County Public Defender Ms. Janice Y. Fukai Los Angeles County Alternate Public Defender	NI	• **THE RULES OF EVIDENCE AT POSTRELEASE COMMUNITY SUPERVISION HEARINGS** The proposed court rule addresses the rules of evidence at hearings on revocation of postrelease community supervision. The rule would permit use of hearsay: "Revocation determinations must be based on a preponderance of the evidence admitted at the hearing, which may include documentary evidence, direct testimony, and hearsay." (Proposed Cal. Rules of Ct., Rule 4.540(g)(2).) The Los Angeles Public Defender's Office and the Los Angeles Alternate Public Defender's Office strongly urge a rule be adopted that bars unconstrained hearsay from being admissible at postrelease community supervision revocation hearings. We urge adoption of the same rules of evidence applicable to probation revocation hearings. It should be noted that in some (perhaps many)	• Please see the advisory committee response to the comment in item #1 above.

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			cases, a person will face a new criminal prosecution coupled with a revocation of the postrelease community supervision. In some of those cases, the defendant will also be on probation. All too often, a defendant sent to prison is also on probation on another case, or even several other cases, but everyone misses this fact, so the defendant serves his time and is paroled, only to still be on probation at the same time he or she is on parole. Of course, the rules of evidence apply to new criminal filings. Hearsay is not admissible at such proceedings, unless a hearsay exception applies. Moreover, *Crawford* v. *Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, adds a constitutional gloss limiting even some otherwise admissible hearsay. The rules governing admissibility of evidence at probation revocation hearings permit some hearsay, but the scope of the admission of such hearsay is very limited. (See, e.g., *People v. Abrams* (2007) 158 Cal.App.4th 396, 405 [evidence viewed "as a substitute for live testimony" is not admissible, but evidence of routine matters such as payment of restitution where the probation officer is not likely to have personal recollection and would instead rely on records would be admissible].) Thus, if the proposed court rule is adopted as drafted, this would create a *third* rule of evidence at hearings combining a new case,	

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			revocation of probation, and revocation of postrelease community supervision; no hearsay, some hearsay, and all hearsay would be admissible. The parties and the judge would find it impossible to keep track of which evidence is admissible for what purpose. If, on the other hand, the court rule specifies that the rules of evidence at probation revocation proceedings apply at hearings on whether to revoke postrelease community supervision, the court would only have to do what it already does, keep track of two rules of when hearsay is admissible. Since this is already being done, it would add no complexity or burden on the court or the parties. We also urge adoption of a court rule requiring the rules of evidence applicable to probation revocation hearings because adoption of such a rule furthers the goals of the entire realignment scheme. The goals are to minimize reincarceration. Penal Code section 3450, subdivision (b)(3), states, "Criminal justice policies that rely on the reincarceration of parolees for technical violations do not result in improved public safety." Adoption of rules permitting broad receipt of hearsay evidence will surely result in revocations and reincarcerations of many parolees who would not otherwise have been found in violation. Finally, we urge adoption of the rules of evidence applicable at probation revocation	

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			hearings because adoption of the current proposed rule would lead to uncertainty and inconsistency in the conduct of postrelease community supervision hearings. There is a well settled body of law governing the rules of evidence at probation revocation hearings. (See *People v. Abrams*, *supra*, 158 Cal.App.4th 396.) However, adoption of a court rule stating that the rules of evidence at postrelease community supervision permit admission of "hearsay" (Proposed Cal. Rules of Ct., Rule 4.540(g)(2)) throw such hearings into chaos. What, exactly, is "hearsay"? Does a live postrelease community supervision agent have to testify to hearsay? Are *all* documents admissible? Are there any limits on hearsay? Of course, in *Morrissey v. Brewer* (1972) 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484, the United States Supreme Court ruled that at parole hearings, due process of law requires "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)," while stating that "the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." (*Id.* at p. 489.) It surely cannot be the rule that so long as the criminal justice system does not *call* it a "parole hearing" (e.g., by calling it a	

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			"postrelease community supervision revocation hearing"), then the constitutional requirements articulated in *Morrissey* do not apply: no due process of law requirements and no limitations on the admission of evidence, despite the fact that these hearings could result in defendants being sent back to state prison. *Some* limitation on the admission of evidence applies, in light of the Due Process Clause, which should preclude the unlimited use of hearsay at postrelease community supervision revocation hearings. Presumably, reports of an unknown or unreliable nature should not be permitted into evidence. But how is this to be determined? It seems inevitable that practices will vary in different counties and even different tribunals in the same county. This will surely lead to appellate litigation and an entire body of jurisprudence on what hearsay is admissible in postrelease community supervision revocation hearings, and what foundation for such hearsay is required. All of this can be obviated by modifying the proposed court rule to provide that hearsay is admissible at postrelease community supervision revocation hearings only to the extent that it is admissible at probation revocation proceedings. For all of these reasons, we urge that the court rule not be adopted as proposed, and that instead	

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			of providing that "hearsay" is admissible at postrelease community supervision revocation hearings, the Rule of Court should state, "Revocation determinations must be based on a preponderance of the evidence admitted at the hearing, which may include documentary evidence, direct testimony, and hearsay, to the limited extent that such evidence would be admissible at a probation revocation hearing." • **THE APPOINTMENT OF COUNSEL FOR SUPERVISED PERSONS IN POSTRELEASE COMMUNITY SUPERVISION PROCEEDINGS** The proposed court rule addresses the appointment of counsel prior to the filing of a petition for revocation of postrelease community supervision ("PRCS"). The rule would require that the supervising agency only file a petition for revocation after, *inter alia*, "The supervising agency has informed the supervised person that he or she is entitled to the assistance of counsel and, if he or she desires but is unable to employ counsel, the supervising agency has referred the matter to the public defender or other person or agency designated by the county to represent supervised persons...." (Proposed Cal. Rules of Ct., Rule 4.540(c)(2)(C).)	• Under the criminal justice realignment legislation, supervising agencies are authorized to conduct certain violation proceedings *without* court involvement. (Pen. Code, § 3454(b) [Authorizing supervising agencies "to determine and order appropriate responses to alleged violation," including flash incarceration].) Court involvement is only triggered by the filing of a petition with the court. Although the committee agrees that supervised persons should be represented throughout all revocation-related proceedings, the committee declines to amend the rules to require the appointment of counsel at proceedings that are not within the purview of courts. For additional information regarding whether the *Valdivia* injunction and related orders apply to community supervision revocation procedure, please see the advisory committee response to the related comment in item #4.

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			The Los Angeles Public Defender's Office and the Los Angeles Alternate Public Defender's Office strongly urge that a rule be adopted requiring that counsel be appointed **prior** to the supervising agency holding any probable cause hearing and prior to any decision being made with regards to the filing of a petition for revocation. We urge adoption of a rule that allows for counsel to be appointed at such an early stage to advise supervised persons prior to the probable cause determination made by the supervising agency. It should be noted that currently, according to the Stipulated Order For Permanent Injunctive Relief that was prepared pursuant to the United States District Court decision in *Valdivia v. Davis* (2002) 206 F.Supp.2d 1068, parolees are appointed counsel at an early stage of the revocation proceeding, to advise the parolees before the probable cause hearings and to continue representation through the entire revocation proceeding, up to and including the full revocation hearing. (Stipulated Order for Permanent Injunctive Relief, Civ. S-940671 LKK/GGH, pp.3-4.) Under the current parole system, due process demands that parolees are appointed counsel to advise them prior to the probable cause hearing, therefore, it is only logical that the new rule governing supervised persons have the same due process protections. Based on informal discussions with parole	

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			attorneys and observations of parole probable cause and parole revocation hearings by Public Defender staff, it is quite clear to us that appointed counsel perform several important functions on behalf of their clients. In addition to advising their clients about the parole process, counsel challenge the probable cause for parole holds through vigorous cross-examination during the probable cause hearings. Counsel also negotiate dispositions for their clients with the Board of Parole commissioners who preside over the probable cause hearings and the revocation hearings. Anecdotal evidence indicates that approximately 85% of cases resolve without the necessity of a full formal revocation hearing. If most parole revocation proceedings do not even reach the revocation hearing stage, it makes little sense to promulgate a court rule that precludes appointment of counsel until just before the petition for hearing is even filed. The logical rule to create is one that maintains the due process standard currently in use: that counsel is to be appointed prior to the probable cause hearing stage. This will allow each and every supervised person to receive competent counsel to properly advise him or her prior to the probable cause hearing, and to advise him or her about accepting an offer rather than proceeding to a full revocation hearing. For all of these reasons, we urge that the court	

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			rule not be adopted as proposed, and that instead of providing that counsel be appointed prior to the petition for revocation being filed, the Rule of Court state: "Prior to the supervising agency establishing probable cause to believe that the supervised person has violated a term or condition of community supervision, the supervising agency has informed the supervised person that he or she is entitled to the assistance of counsel and, if he or she desires but is unable to afford counsel, the supervising agency has referred the matter to the public defender or other person or agency designated by the county to represent supervised persons."	
19.	Hon. Stephen Manley Superior Court of California, County of Santa Clara	AM	I participated in the workgroup that helped draft the proposed Rules. I also preside over a Parole Reentry Court, and have worked with parolees in violation for over three years. After giving further thought to our draft Rules, my suggestions are as follows: • The proposed rule 4.540 (e) requires that the supervising agency give notice to the supervised person. However, the draft Petition does not contain verification under penalty of perjury that the appropriate notice has been given. In my experience not all parolees charged with a violation are in custody, and I suggest that under the new	• The committee declines this suggestion as unnecessary. The rule is designed to provide courts with wide discretion to determine whether notice has been provided as required by subdivision (e).

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			procedure many will be out of custody at the time the Petition is filed. Therefore, to guarantee due process, and conserve Judicial resources[,] I suggest that [item 7] be added to the Petition for Revocation as follows: "PROCEDURAL INFORMATION: Notice of the hearing date and time, circumstances of the violation and right to counsel have been provided to the supervised person as provided by law." This is a routine requirement in our Violation of Probation process in my Court, including the personal notice or "Vicker's letter," and it makes practical sense to provide for it in this new process. • Rule 4.540(c)(2)(C) requires that the supervising agency has referred the "matter to the public defender or other person…" I suggest that this is an impractical requirement of the Supervising Agency as a prerequisite to filing a Petition. There is no case number, nor date nor time set, nor circumstances of violation in writing called for at the time of the referral, and simply "referring" the supervised person may only result in confusion and poor utilization of limited resources. The obligation is with the Court and not the Supervising Agency to appoint	• The committee declines to delete subdivision (c)(2)(C), which is designed to promote the counsel rights of supervised persons throughout the revocation process. However, to clarify that the rule is not intended to interfere with the court's authority to appoint counsel, the committee added the following advisory committee comment: "This subdivision is designed to ensure that indigent supervised persons who desire counsel are represented as early in the revocation proceedings as possible. Nothing in this subdivision is

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			counsel. Again, I suggest that we leave the traditional way Courts have addressed the issue of counsel at Probation Violation hearings as is, and not confuse the issue by requiring a pre-filing referral. • As to Rule 4.540(c)(D) I suggest that this requirement be dropped. If the Supervising Agency has met the requirements of (B), why must they also be required to propose a sanction, demonstrate that the defendant refused it and denied the violation that has not yet been filed? In my experience, and in reviewing the data that CDCR has provided regarding existing violations, "absconding" parole is common. Under this new procedure and realignment it is probable that many persons released from prison will not promptly report (let alone meet the two day requirement). If the person to be supervised fails to report, or subsequently absconds and cannot be located, the Supervising Agency should not be required to propose a sanction, etc. before filing a petition. This would be impossibility. Court intervention is needed, and the standard should be (B) not (B) and (D). Moreover, the Supervising Agency has very limited "sanction" authority in terms of incarceration. I suggest that the	intended to infringe on court authority to appoint counsel or allow a supervised person to waive the right to counsel." • Subdivision (c)(2)(D) has been deleted. Please see the advisory committee response to the related comment in item #5 above.

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			test should be whether or not the Supervising Agency has utilized multiple interim sanctions, that will include but not be limited to flash incarceration, without success. • In sum, I have the concerns that I have outlined. However, I think that the proposed rules are well written as well as the draft Petition, and I think that even if no changes are made, local Courts can work within its framework, particularly because of the Advisory Committee Comment that encourages local rules and acknowledges the importance of flexibility. Finally, as to Mars[y]'s law, I think that we should assume that it does apply as to this process, other than as to reporting to the Governor, and that we should propose a rule that is compatible with its intent.	• Please see the advisory committee response to the related comment in item #2 above regarding victim notice requirements.
20.	Hon. Paul Marigonda Superior Court of Santa Cruz County	AM	I would delete the requirement in Proposed Rule 4.540(c)(2)(C) requiring the supervising agency to refer the matter to the public defender or other county defender agency before a petition for revocation is filed. Often, a violation is admitted by a defendant in court without counsel being appointed because the defendant agrees with the proposed sanction/indicated sentence without the need for an attorney.	The committee declines to delete subdivision (c)(2)(C), which is designed to promote the counsel rights of supervised persons throughout the revocation process. However, to clarify that the rule is not intended to interfere with the court's authority to appoint counsel, the committee added the following advisory committee comment: "This subdivision is designed to ensure that indigent supervised persons who desire

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				counsel are represented as early in the revocation proceedings as possible. Nothing in this subdivision is intended to infringe on court authority to appoint counsel or allow a supervised person to waive the right to counsel."
21.	Nevada County District Attorney Ms. Anna Ferguson Assistant District Attorney	N	The revocation process is just like [violation of probation] proceedings. There should be one hearing only, not two. There will be enough burdens put on the [district attorneys] and the court with a single formal hearing, and even if a [probable cause] hearing were necessary, the 5 court day deadline is absurd. How about 10 days like a preliminary hearing?	Rule 4.540 is intended to provide courts with wide discretion to schedule hearings. As explained in the advisory committee comment: "The committee acknowledges that the practices related to the scheduling of court appearances vary from county to county. Nothing in this rule is intended to prohibit courts from scheduling court appearances according to local needs and customs." In addition, the committee declines to extend the deadline for review of probable cause to 10 days because the proposed deadline promotes due process by ensuring prompt court review.
22.	Mr. Fritz Ohlrich Clerk of the California Supreme Court	NI	… • Subdivision (g)(1) of the proposed rule requires a hearing on a petition for revocation of community supervision to be held within 45 days of the filing of the petition. This appears to follow the time deadline set forth in Penal Code section 3044, subdivision (a)(2), which requires a formal revocation hearing to be held within 45 days of arrest for a violation of parole. This statute became effective November 5, 2008, after the	• For information regarding the applicability of the *Valdivia* injunction and related orders, please see the advisory committee response to the related comment in item #4 above.

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			electorate passed Proposition Nine, or Marsy's Law. Prior to that date, the allowable limit for a parole revocation hearing was 35 days under Provision 23 of the November 19, 2003 stipulated order for permanent injunctive relief in *Valdivia v. Schwarzenegger*, No. CIV-S-94-671, entered pursuant to *Valdivia v. Davis* (2002 E.D.Cal.) 206 F.Supp.2d 1068. My concern is that the Criminal Law Advisory Committee be aware of possible litigation. According to the web site of the California Department of Corrections and Rehabilitation, (http://www.cdcr.ca.gov/BOPH/marsys_law.html): "Marsy's Law included changes to the procedural hearing rights of parolees who are facing revocation of parole. Along with hearing timeframes and setting forth the preponderance of evidence standard in parole revocation hearings, Marsy's law also adds eligibility criteria for parolees to obtain an attorney for revocation proceedings at state expense. At this time, the state is under federal court order to refrain from implementing the Marsy's law revocation changes, pending resolution of the matter in the class action lawsuit entitled *Valdivia, et al. v. Schwarzenegger, et al.*, U.S. District Court (Eastern District) Case No. 2:94-cv-00671-LKK-GGH." While strictly	

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			speaking, Marsy's Law only concerns parole revocation proceedings, as opposed to revocation of community supervision, the same logic applies, and were the rule to be promulgated as proposed, this provision may be subject to and incorporated into the pending federal litigation and be stayed. • My second concern is with subdivision (g)(2) of the proposed rule, which allows for the use of hearsay at community supervision revocation hearings. A parolee has a right to confront and cross-examine adverse witnesses, unless the hearing officer finds good cause for not allowing the confrontation. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 489; *In re Miller* (2006) 145 Cal.App.4th 1228, 1236.) In determining whether the right to confrontation was violated, a court must weigh the parolee's right to confrontation against the good cause for denying it. (*United States v. Comito* (9th Cir. 1999) 177 F.3d 1166, 1170-1171.) This "balancing test hinges on the importance of the hearsay evidence to the finder-of-fact's ultimate finding and the nature of the facts to be proven by the hearsay evidence." (*Miller*, *supra*, 145 Cal.App.4th at p. 1236 [citing *Comito*].) Previously, hearsay	• Please see the advisory committee response to the related comment in #1 above.

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			was admissible at parole revocation hearings, especially in the form of documentary evidence. (*In re Carroll* (1978) 80 Cal.App.3d 22, 30.) Under Provision 24 of the Stipulated Order for Permanent Injunctive Relief in *Valdivia v. Schwarzenegger, supra*, the California Department of Corrections and Rehabilitation agreed to limit the use of hearsay evidence pursuant to the *Comito* decision. (*Miller, supra*, 145 Cal.App.4th at p. 1237.) Under Marsy's Law, hearsay is now allowed at parole revocation hearings. (Pen. Code, § 3044, subd. (a)(5).) As noted above, however, at this time, the state is under federal court order to refrain from implementing the Marsy's law revocation changes, pending resolution of the matter in *Valdivia v. Schwarzenegger, supra*. Once again, promulgation of the rule as proposed may result in federal litigation and a stay.	
23.	Mr. Steven D. Powell Farley, Cassy, Schwartz & Powell	NI	Who will pay the cost of appointed counsel[?] Will the State pay or does the State expect to fob [sic] the cost to the County? Who will pay the cost of housing the incarcerated parolee? State or County? Why should Counties be burdened by State obligations? If [a] violation is found and incarceration is the disposition, who will pay, State or County?	Issues related to the cost of the criminal justice realignment legislation exceed the scope of this proposal.

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24.	Riverside County Probation Department Mr. William Plamer Division Director	AM	• It appears the suggested procedure is combining parole timelines and probation practice. Riverside County Probation Department's concern is the complexity of the suggested procedure and abundant information regarding the required written report in addition to the form CR-300. To include a summary of the supervised person's criminal record could become exceptionally lengthy. Perhaps putting limits on the type of convictions or to be able to group the number and types of convictions, identifying the time span of years the supervised person committed their crimes would be recommended. If all the recommended information outlined for the written reports is required, then we also recommend the Advisory Committee note it is to be brief, not to replicate a presentence report. • The last question is to clarify what is meant by the "Advisory Committee" Comment. Is this to [be] in the form of a "Disclaimer" at the end of the Form CR-300 or the Written Report?	• Please see the advisory committee response to the related comment in item #6 above. • The advisory committee comments are intended to provide additional information regarding specific provisions of the rules.
25.	Mr. Edward R. Rojas Attorney	A	[Rule] 4.540(h)(3) should read "(h)(2)(A) and (B)" NOT "(g)(2) ..."	Agreed. The reference to subdivision (g)(2) is a typographical error.
26.	Mr. Jeffrey F. Rosen	AM	Thank you for the opportunity to comment on	

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	Santa Clara County District Attorney		proposed rules of court 4.540 and 4.541. I do not agree with the proposed rules as drafted, but instead suggest the revisions contained in the attached drafts of both proposed rules. For clarity, I have deleted the underlining in the original proposed rules and utilized underli[ni]ng and strikethroughs to highlight my proposed revisions. In addition to technical corrections, my proposed revisions are submitted in context of the following: As stated in the proposed Advisory Committee Comments, each county utilizes practices and customs unique to their needs and these rules should reflect that diversity and therefore be presented in a less specific and rigid tone, allowing for local needs and customs, particularly with regard to calendar management, to retain a function of primary guidance. • There may be some ambiguity as to whether the Probable Cause Review stage of these proceedings is intended to be a court event or a ministerial review of the petition, akin to a magistrate's review of arrest warrant affidavits. I have adopted the latter view and therefore would not support a requirement that the supervising agency be required to attach to the initial petition a lengthy (and costly to prepare) social report. The information	• Please see the advisory committee responses to the related comments in item #6 above regarding supervising agency report requirements and probable cause review requirements.

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			to be included in such a report would not be relevant to a probable cause determination, therefore the deferring of that report until after a finding of probable cause is made would not prejudice the supervised person's rights. Further, in instances where the hearing officer concludes probable cause is not established, no social report need ever be written, saving valuable resources of the supervising agency which can be reinvested in the goals of public safety realignment, including supportive and close supervision of supervised persons. Although Penal Code [section] 3455 (as amended by [Assembly Bill] 117) states that the petition "shall include" such a report, a reasonable reading of that requirement (a[t] least until suitably-modified language can be enacted) would not preclude the report being "included" at a later date, at the court's direction (in cases where there is both a finding of probable cause and a need for a formal hearing). My attached revision adopts the latter interpretation; • I think it should be expressly noted that some revocation petitions will be filed in instances where the supervised person has had little (or no) contact with the supervising agency. In these situations, the supervising agency will	• Legislation enacted after this proposal circulated for public comment authorizes supervising agencies to request warrants (Pen. Code, § 3455(a)(4)) and detain the supervised person pending resolution of the revocation proceedings. (Pen. Code, §

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			have no practical ability to provide notice to the supervised person of proposed sanctions, or even a hearing date, therefore these steps should be excused upon a showing of inability to contact the supervised person despite the exercise of due diligence. The hearing officer should have express authority to issue arrest warrants in such situations, including when a supervised person fails to appear at a formal revocation hearing.	3455(d).) Supervising agencies should only file a petition to revoke *after* an absconding supervised person has been detained and the agency has employed its "assessment processes" to determine if a petition to revoke is necessary as required by Penal Code section 3455(a).
			• My suggested revisions would also entail the deletion of bullet # 3 on Form CR-300 (to delete the requirement that a written report be attached to the petition) and to delete reference to the written report in Bullet # 4.	• The committee declines the suggestions because providing courts with written reports as early in the proceedings as possible promotes early dispositions and avoids unnecessary hearings.
			• Finally, I have a question. Is proposed rule 4.540(h)(2)(B) to be understood as a mechanism to execute a jail sentence with no subsequent term of supervision of any sort? **[Specific suggested amendments to Rule 4.540]** ... **(c) Petition for revocation** … (2) The supervising agency may only file a petition for revocation after all of the	• Proposed rule 4.540(h)(2)(B) tracks the language of Penal Code section 3455(a)(2), which authorizes courts to "[r]evoke postrelease supervision and order the person to confinement in county jail."

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			following have occurred: (A) The supervising agency has ~~established~~ probable cause to believe the supervised person has violated ~~a~~ one or more terms or conditions of postrelease community supervision;	• The committee declines this suggestion as unnecessary.
			(B) The supervising agency has determined, following application of its assessment processes, that intermediate sanctions without court intervention as authorized by Penal Code section 3454(b) are not appropriate responses to the alleged violation(s);	• The committee declines the suggestion as unnecessary.
			~~(C) The supervising agency has informed the supervised person that he or she is entitled to the assistance of counsel and, if he or she desires, but is unable to employ counsel, the supervising agency has referred the matter to the public defender or other person or agency designated by the county to represent supervised persons; and~~	• The committee declines to delete subdivision (c)(2)(C) for the reasons stated in the advisory committee response to the related comment in item #19.
			(C) The supervising agency has advised the supervised person of the alleged violation(s) or, within the exercise of due diligence, has been unable to	• Legislation enacted after this proposal circulated for public comment authorizes supervising agencies to request warrants

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			advise the supervised person of the alleged violation(s);	(Pen. Code, § 3455(a)(4)) and detain the supervised person pending resolution of the revocation proceedings. (Pen. Code, § 3455(d).) Supervising agencies should only file a petition to revoke *after* an absconding supervised person has been detained and the agency has employed its "assessment processes" to determine if a petition to revoke is necessary as required by Penal Code section 3455(a).
			(D) The supervising agency has proposed ~~a~~ one or more sanctions in response to the alleged violations but the supervised person has ~~denied the violation~~ declined to admit the violation(s), to accept the proposed sanction(s) and to waive a court hearing as authorized by Penal Code section 3455(a); and	• Subdivision (c)(2)(D) has been deleted as explained in the advisory committee response to the related comment in item #5 above.
			… (3) Petitions for revocation must be made on *Petition for Revocation of Postrelease Community Supervision* (form CR-300) ~~and must include a written report from the supervising agency that includes the declaration and information required under rule 4.541.~~	• The committee declines the suggestion because report requirements are necessary for the proper adjudication of the proceedings.
			(4) Upon filing the petition, the supervising agency must ~~provide copies~~ serve a copy of the petition ~~and written~~	• The committee declines this suggestion as unnecessary as explained above.

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			~~report to~~ upon the prosecutor and supervised person or the supervised person's counsel, if any, except as excused pursuant to subdivision (c)(2)(C) of this rule. **(d) Probable Cause Review** (1) The court must review whether probable cause exists to support a revocation of postrelease community supervision within five court days of the filing of the petition. ~~To conduct the~~ In conducting its review, the court may rely on any information contained in the petition and ~~written report of the supervising agency~~ any attachments. If the court determines that probable cause exists to support a revocation, the court must indicate the determination on *Petition for Revocation of Postrelease Community Supervision* (form CR-300) ~~and~~, preliminarily revoke supervision and confirm the date and time set for the formal hearing to revoke supervision. The court may also set such other and further court dates in advance of the formal hearing date in compliance with local custom and practice as aids to facilitate settlement discussions. The court shall notify the supervising agency of its findings and the supervising agency must notify the	• The committee declines to modify the report requirements for the reasons stated above. The committee also declines to prescribe specific hearing requirements to ensure that courts have broad discretion to schedule hearings according to local needs.

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			prosecutor, supervised person, supervised person's counsel, if any, and any victims of the court's findings and of the date, time and place of any hearing(s) related to the petition. ~~(2) If the court determines that no probable cause exists to support the revocation, the court must dismiss the petition, vacate any scheduled hearings, and return the person to community supervision on the same terms and conditions. If the court dismisses the petition, the supervising agency must notify the prosecutor, supervised person, and supervised person's counsel, if any, of the dismissal.~~ (2) If the court determines that probable cause exists to support a revocation and the supervised person has not been served with a copy of the petition for the reasons set forth in subdivision (c)(2)(C) of this rule, the court shall issue a warrant of arrest for the supervised person. (3) If the court determines that no probable cause exists to support the revocation, the court must dismiss the petition, vacate any scheduled hearings, and return the person to community supervision on the same terms and	• The committee declines this suggestion for the reasons explained above. • The committee declines this suggestion as unnecessary. For more information regarding victim notice requirements, please see the committee response to the related comment in item #2 above.

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			conditions. If the court dismisses the petition, the supervising agency must notify the prosecutor, supervised person, ~~and~~ supervised person's counsel, if any, and any victims of the dismissal. **~~(e)~~ ~~Notice of Hearing~~** ~~The supervising agency must provide notice of the date, time, and place of any hearing related t the petition to revoke to the supervised person, the supervised person's counsel, if any, the prosecutor, and any victims.~~ **~~(f)~~(e) Waiver** At any time before a formal hearing on ~~the~~ a petition to revoke postrelease community supervision, the supervised person may waive ~~a~~ his or her right to a formal hearing and admit ~~a~~ the violation(s). **~~(g)~~(f) Formal Hearing** (1) The formal hearing on the petition for revocation must occur no later than 45 days after the date the petition is filed unless the supervised person waives this deadline or the court finds good cause to continue the formal	• The committee declines the suggestion because notice requirements promote due process. • The suggestion is unnecessary. As noted above, the committee amended subdivision (f) to track the language of Penal Code section 3455(a). • The committee declines the suggestion as unnecessary.

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			hearing. (2) Revocation determinations must be based upon a preponderance of the evidence admitted at the hearing, which may include documentary evidence, direct testimony, and reliable hearsay. Admission of the recorded or hearsay statement of a witness ~~must not be construed to~~ does not create a right to confront the witness at the hearing. **~~(h)~~(g) Revocation** (1) If the court finds that the supervised person has not violated a term or condition of supervision, the court must dismiss the petition and return the supervised person to postrelease community supervision on the same terms and conditions. (2) If the court finds that the supervised person has violated ~~a~~ one or more terms or conditions of supervision, the court may: (A) Return the supervised person to community supervision with modifications of terms or conditions, if appropriate, including a period of incarceration in county jail;	• Please see the advisory committee response to comment #1 above. • The committee declines this suggestion as unnecessary. • The committee declines this suggestion as unnecessary. • The committee declines this suggestion as unnecessary.

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			(B) Revoke supervision and order the supervised person to confinement in county jail; or … (3) Any confinement ordered by the court under subdivision ~~(g)~~(h)(2)(A) and (B) must not exceed a period of 180 days in county jail. **Advisory Committee Comment** The committee acknowledges that the practices related to the scheduling of court appearances vary from county to county. Nothing is this rule is intended to prohibit local courts from scheduling court appearances according to local needs and customs, including requiring court appearances before ~~formal~~ evidentiary hearings on the petition to revoke. When filing a petition, petitioners should consult local rules and court staff regarding specific requirements for scheduling court appearances related to revocation petitions. **Rule 4.541. Supervising Agency Reports** **(a) Declaration** A petition for revocation of postrelease community supervision under Penal	• Agreed. The word "or" has been added at the end of subdivision (h)(2)(B). • Agreed. The reference to subdivision (g) is a typographical error. • The committee declines this suggestion as unnecessary.

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			Code section 3455 must include a declaration signed under penalty of perjury that confirms that the requirements prescribed by rule 4.540(c)(2)(A) have been satisfied. **(b) Minimum Contents** A petition for revocation of <u>postrelease</u> community supervision under Penal Code section 3455 must ~~include a~~ <u>be augmented by</u> a written report, <u>at the court's direction, following a finding of probable cause.</u> <u>The written report may include, but is not limited to,</u> ~~contains at least~~ the following information: (1) Information about the supervised person, including (a) personal identifying information, including name and date of birth; (b) custody status and the date and circumstances of arrest; (c) any pending cases and case numbers; (d) the history and background of the supervised person, including a summary of the supervised person's record of prior criminal conduct; and (e) all relevant information concerning the ~~defendant's~~ <u>supervised person's</u> social history, including family, education, employment, income, military, medical, psychological, and substance abuse information;	• The committee declines the suggestion as unnecessary. • The committee declines this suggestion as unnecessary. • Agreed. The committee replaced the word "defendant" with "supervised person" for consistency.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

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			(2) All terms and conditions of supervision and the facts and circumstances of ~~the~~ any alleged underlying violation(s), including a summary of any statement made by the supervised person, and any victim information, including statements and amount of loss; and (3) A summary of all previous violations and sanctions, including flash incarceration, and the reasons that the supervising agency has determined that intermediate sanctions without court intervention as authorized by Penal Code [section] 3454(b) are not appropriate responses to the alleged violation(s); ~~and~~. ~~(4) Any recommended sanctions and a summary of sanctions proposed by the supervising agency in response to the alleged violation before the filing of the petition but rejected by the supervised person.~~ ...	• The committee declines the remaining suggestions as unnecessary.
27.	Rosen, Bien & Galvan, LLP Mr. Ernest Galvan	N	… Proposed Rule 4.540 represents a grave violation of constitutional due process rights. The rule must not be implemented in its current form. Instead, it must be completely rewritten to	For information regarding the applicability of the *Valdivia* injunction and related orders, please see the advisory committee response to the related comment in item #4 above. Responses to more

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			conform with the minimum requirements of due process as set forth by the United States Supreme Court in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972); *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973); and *United States* v. *Comito,* 177 F.3d 1166 (9th Cir. 1999) as well as by the California courts in cases such as *People* v. *Arreola,* 7 Cal. 4th 1144 (1994); *People* v. *Shepherd,* 60 Cal.Rptr. 3d 616 (Cal. Ct. App. 2007); and *In re Miller,* 52 Cal.Rptr. 3d 256 (Cal. Ct. App. 2006). This firm represents the class of all California state parolees in *Valdivia, et al.* v. *Brown, et al.*, No. CIV. S-94-671 in the United States District Court for the Eastern District of California. The *Valdivia* lawsuit was filed in 1994 against the Governor and state officials in charge of the Board of Prison Terms (now called the Board of Parole Hearings, "BPH") and the California Department of Corrections (now called the California Department of Corrections and Rehabilitation, "CDCR"), challenging violations of parolees' due process rights in the parole revocation process. The *Valdivia* Summary Judgment Order and *Valdivia* Injunction establish parolees' due process rights, including providing for a two-tiered revocation hearing process and timeframes for probable cause and revocation hearings. *See Valdivia* v. *Davis,* 206 F.Supp. 2d 1068, 1070 (E.D. Cal. 2002) ("Summary Judgment Order"), attached as Exhibit 1 [Please note that Exhibit 1 is not	specific comments are provided below.

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			attached to this chart. However, the text of the exhibit may be reviewed at the citation noted above]; Stipulated Order for Permanent Injunctive Relief ("*Valdivia* Injunction"), Dkt. No. 1034, attached as Exhibit 2. [Please note that the full text of Exhibit 2 is attached to this comment chart as "Attachment A"]. This firm also represents the class of all California state parolees with mobility, hearing or sight impairments, and developmental or learning disabilities that substantially limit a major life activity in the class action *Armstrong* v. *Brown,* S-94-2307 (N.D. Cal.). The *Armstrong* case, brought under the Americans with Disabilities Act and the Rehabilitation Act of 1974, establishes the right of persons with disabilities to effective communication and reasonable accommodation in all proceedings involving consideration for parole, as well as revocation of parole. *See Armstrong* v. *Schwarzenegger,* 622 F.3d 1058 (9th Cir. 2010); *Armstrong* v. *Davis,* 275 F.3d 849 (9th Cir. 2001). The disability rights of parolees under *Armstrong* are not lessened in anyway by delegation of supervision or revocation of responsibilities from one governmental entity to another. *See Armstrong,* 622 F.3d at 1074 (rejecting as "barely colorable" arguments that the State can avoid its obligations under federal law by delegating to other entities of state government); *see also Tennessee* v. *Lane,* 541 U.S. 509, 533-534 (2004) (holding that Title II	

	Commentator	Position	Comment	Advisory Committee Response
			of the Americans with Disabilities Act applies with full force in "class of cases implicating the fundamental right of access to the courts"). **I. BACKGROUND** *Morrissey* addressed parolees' due process protections during the parole revocation process. Before the state can return a parolee to prison, it must provide due process, including procedures which will prevent revocation because of "erroneous information or because of an erroneous evaluation." *Morrissey*, 408 U.S. at 484. *Morrissey* requires a two stage process to reduce the harms to the individual and society caused by prolonged detention without prompt independent review, and to ensure accurate fact-finding regarding the alleged violations. *Id.* The two stages are a prompt preliminary hearing at or near the time of arrest, and a prompt final revocation hearing. *Id.* at 485. The first stage, the preliminary hearing, is to occur promptly after the parolee has been arrested and detained. *Id.* The parolee must be given notice of and the purpose for the hearing and there must be a determination of whether there is probable cause that a parole violation has occurred. *Id.* at 486-87. "The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant	

	Commentator	Position	Comment	Advisory Committee Response
			information to the hearing officer." *Id.* at 487. *Morrissey* explains that the second step takes place prior to a final decision on revocation. *Id.* at 487-88. Before final revocation, there must be an opportunity for a hearing that "lead[s] to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation." *Id.* at 488. The *Gagnon* Court went further regarding the parole revocation process, holding "that a parolee is entitled to two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision." *Gagnon,* 411 U.S. at 781-82. The Court explained that a preliminary hearing must include notice of the alleged violations against the parolee, an opportunity to present evidence and appear at the hearing in person, a conditional right to confront witnesses, a decision maker not directly involved in the case, and a written report of the hearing. *Id.* at 786. *Morrissey* and *Gagnon* laid the foundation of the Supreme Court's administrative due process jurisprudence, as later set forth in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976). *Mathews* described a three step balancing test to resolve	

	Commentator	Position	Comment	Advisory Committee Response
			procedural due process issues. The first step is to evaluate "the degree of potential deprivation that may be created by a particular decision." *Id.* at 341, *citing Morrissey*, 408 U.S. 471 (1972). The next two steps consider the fairness and reliability of the existing procedures and the probable value, if any, of adding additional safeguards to the system and the administrative burden and other societal costs involved with more process. *Mathews*, 424 U.S. at 343,347. Until 2004, the state of California allowed for only one hearing on the decision to revoke parole. This was California's "unitary" hearing system, which did not provide for a preliminary revocation hearing to determine that a parolee committed a parole violation. "Rather, California ... adopted a wholly internal review system from which the parolee is entirely excluded." *Valdivia*, 206 F. Supp. 2d at 1070, Ex. 1. The parolee, being excluded entirely from the internal review system, received no opportunity "to speak to the charges, challenge the contents of the violation report, present his own evidence, or to question witnesses." *Id.* In 1994, that system, including the unitary parole revocation hearing process, was contested when California parolees sued the State to challenge systemic violations of due process and the resulting return to prison of thousands of persons each year without reliable and accurate fact-finding.	

	Commentator	Position	Comment	Advisory Committee Response
			In June 2002, after nearly a decade of litigation, the United States District Court for the Eastern District of California, received extensive evidence regarding the operation of California's unitary hearing system, analyzed the system under the *Mathews* v. *Eldridge* due process balancing test, and the more specific requirements of *Morrissey* and *Gagnon*, and concluded that the unitary scheme systemically deprived parolees of their minimal due process rights. *Id.* at 1078. Among other things, the *Valdivia* Court held that "allowing a delay of up to forty-five days or more before providing the parolee an opportunity to be heard regarding the reliability of the probable cause determination" violates the plaintiffs' due process rights and, therefore, is unconstitutional. *Id.* The *Valdivia* court's ruling that California's prior system was unconstitutional led to the *Valdivia* Injunction, which was approved and entered by the Court on March 9, 2004. *See generally Valdivia* Injunction, Ex. 2. Among the *Valdivia* Injunction's parole revocation procedures to comply with the requirements of due process include the following: o No later than three days after the detention of a parolee for a revocation proceeding, the parolee must be served with actual notice of the alleged parole violation, including a short factual	

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All comments are verbatim unless indicated by an asterisk (*).

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			summary of the charged conduct and written notice of the parolee's rights regarding the revocation process and timeframes. *Valdivia* Injunction, Ex. 2, at,§ (b)(iii); o Defendants shall appoint counsel for all parolees beginning at the Return to Custody Assessment ("RTCA") stage of the revocation proceeding (where Defendants offer a parolee a specific disposition in return for a waiver of the parolee's right to a preliminary or final revocation hearing, or both).Defendants shall provide an expedited probable cause hearing upon a sufficient offer of proof by appointed counsel that there is a complete defense to all parole violation charges that are the basis of the parole hold. *Id.* at 11(b)(i); o Unless waived or continued, parolees must be provided with a hearing to determine probable cause no later than 10 business days of the notice of the charges and rights. *Id.* at, 11(d); and o Unless waived or continued, parolees must be provided with a final revocation hearing on or before the 35th calendar day after the detention of the parolee for a revocation proceeding. *Id.* at 11(b)(iv).	

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			The *Armstrong* disabilities case, after a full contested trial, resulted in a Permanent Injunction, issued in 1999, and modified after appeal in 2002, that is still in force. The *Armstrong* Injunction's requirements are taken from Title II of the Americans with Disabilities Act (ADA) and its implementing regulations. The *Armstrong* Injunction's application of these core ADA requirements has been upheld in several published appellate decisions. *See Armstrong,* 622 F.3d at 1058; *Armstrong,* 275 F.3d at 849. The *Armstrong* Injunction includes, among other requirements, the following: o Parolees in revocation proceedings must receive equally effective communication of rights, charges, and all steps in the process. *See Armstrong* v. *Davis,* No. C 94-02307 CW, (N.D. Cal. 2002), Stipulation and Order on Revised Injunction *("Armstrong* Injunction"), attached as Exhibit 3, at [paragraphs] 10, 12. [Please note that the full text of Exhibit 3 is attached to this comment chart as "Attachment B"]. o Parolees must receive reasonable accommodations, including, but not limited, to sign language interpreters and assistive hearing devices for the deaf and hard of hearing, assistive devices for the blind and persons with	• The committee declines to amend the proposed rules to prescribe specific requirements for persons with disabilities because the rights of disabled persons are separately prescribed by state and federal laws.

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			vision impairments, and accessible hearing locations for persons with mobility impairments. *Id.* at [paragraphs] 6(b), 22, 29. o Before parolees with disabilities are required to decide whether to waive their hearing rights in return for an offer of a set term of revocation, parolees must receive the benefit of a waiting period of 72 hours after effective communication of the charges, rights, and the offer. *Id.* at [paragraphs] 24, 25. o A key part of the accommodation of effective communication is the provision of specially trained counsel to represent parolees with disabilities in the revocation process. *Id.* at [paragraphs] 27, 30. o Information regarding parolees' disabilities, and necessary measures needed for effective communication and reasonable accommodation must be tracked from one parole proceeding to another, so that the parolees' rights to timely proceedings are not denied through repetitive postponement of proceedings to arrange necessary assistance, such as sign language interpreters, trained attorneys, and accessible locations. *Id.* at [paragraphs]	

	Commentator	Position	Comment	Advisory Committee Response
			15, 16; *Armstrong* v. *Schwarzenegger*, Case No. C 94-2307 CW, (N.D. Cal. 2006), Order Granting Motion to Enforce Revised Permanent Injunction at 3-4; *Armstrong* Order Granting Plaintiffs' Motion to Require Defendants to Track and Accommodate Needs of *Armstrong* Class Members Housed in County Jails and Ensure Access to a Workable Grievance Procedure, Dkt. No. 1587, (N.D. Cal. 2009). **II. PROPOSED RULE 4.540 IS UNLAWFUL AND UNCONSTITUTIONAL** **The Proposed Rule Is Unconstitutional Because It Allows Parolees To Be Held In Custody For 45 Days-And Likely Far Longer-With No Opportunity to Contest Probable Cause** The Proposed Rule allows for no prompt appearance by the parolee to contest probable cause. Instead, the parolee can be held for 45 days after the Petition is filed and for an indefinite time after arrest-with no opportunity to contest probable cause. The only prompt review is completely *in absentia.* Proposed Rule 4.540(d)(l). The Proposed Rule essentially recreates the old	• Please see the advisory committee responses to the related comments in items #4 and #6 above.

	Commentator	Position	Comment	Advisory Committee Response
			unitary hearing system that was struck down in *Valdivia.* Just as in the old system, the Section 4.540(d)(l) probable cause determination is simply an *in absentia* document "review"—without a hearing. It does not allow for the parolee to be present or even for the court to take into account any statements or evidence from the parolee. Instead, the court is simply to review the information in the petition and written report of the supervising agency. The federal Constitution, as expounded in *Morrissey, Gagnon,* and *Mathews,* as well as the *Valdivia* and *Armstrong* Injunctions, requires a two-tiered revocation hearing process. The first appearance is necessary to avoid the manifest injustice of a parolee being held for weeks, losing his or her job, housing and family connections, and then being able to show only weeks later that the government made an error in arresting him. Before *Valdivia,* California had a unitary revocation hearing process similar to that in the Proposed Rule. That process has already been determined to be unconstitutional. *See Valdivia,* 206 F. Supp. 2d at 1070, Ex. l. *Morrissey* requires a two stage process: a preliminary hearing and a revocation hearing. *Morrissey,* 408 U.S. at 486-87. *Gagnon* explained that the preliminary hearing of the two stage process determines whether there is probable cause to believe a violation has occurred and must	

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			include a notice of the alleged violation, an opportunity to present evidence, and a right to confront adverse witnesses. *Gagnon,* 411 U.S. at 781-82. The proposed rule fails to provide for a specific time frame in which even the Constitutionally-infirm "probable cause review" will take place. The Proposed Rule sets the *in absentia* review within five court days of *the filing of the petition.* But the Proposed Rule does not set forth a time frame for filing the petition. Presumably, the supervised person could be held on a parole hold for several days or even weeks before a petition is ultimately filed with the Court. There is no deadline for filing the petition. • **The Appointment and Assistance of Counsel Provisions of Proposed Rule 4.540 Are Unlawful and Unconstitutional** Under the Proposed Rule, the parolee would be offered a plea bargain in lieu of hearing rights, and would have to decide whether to accept the deal without the assistance of counsel. Proposed Rule 4.540(c)(2)(C). This section of the Proposed Rule is simply insufficient and unlawful. In order for attorneys to be effective, counsel must be present when the parolee is required to make decisions about the waiver of substantive rights. *See Valdivia,* 206 F. Supp. 2d	• Please see the related advisory committee response to the related comment in item #18 above.

	Commentator	Position	Comment	Advisory Committee Response
			at 1070, n.4, Ex. 1 (where the Court stated that the effect of a screening offer (the tendering of a term of incarceration in exchange for disposition of case and waiver of parolee's right to have a revocation hearing and, therefore, no counsel) prior to a determination of probable cause may raise due process questions). For this reason, the *Valdivia* Injunction requires consultation with counsel before any discussion or decision of a plea bargain. *See Valdivia* Injunction, Ex. 2, at [paragraph] 11(b)(i). In addition, under federal disability law, as well as the *Armstrong* and *Valdivia* Injunctions, both the tribunal and appointed counsel have special responsibilities to ensure effective communication and reasonable accommodation of disability-related needs. *See Valdivia* Injunction, Ex. 2, at, 13 (providing that counsel be informed at the time of appointment of communication issues, "including but not limited to: mental illness, other cognitive or communication impairments, illiteracy, limited English language proficiency, and the need for a foreign language interpreter," and that the "appointment shall allow counsel adequate time to represent the parolee properly at each stage of the proceeding."); *Armstrong* Injunction, Ex. 3, at [paragraphs] 27, 30 (providing that counsel "must be adequately trained to provide accommodations to persons with disabilities and must receive adequate additional time for providing those services. Attorneys appointed to	• Again, the committee declines to amend the proposed rules to prescribe specific requirements for persons with disabilities because the rights of disabled persons are separately prescribed by state and federal laws.

	Commentator	Position	Comment	Advisory Committee Response
			represent individuals with disabilities shall be informed of their clients' disabilities"). The Proposed Rule only requires that the supervising agency inform "the supervised person that he or she is *entitled* to the assistance of counsel and, if he or she desires but is unable to employ counsel, the supervising agency has referred the matter to the public defender or other person or agency designated by the county to represent supervised persons." Proposed Rule 4.540(c)(2)(C) (Emphasis added). Not only does the rule fail to set a deadline or timeframe for the appointment of counsel, it does not *require* that counsel be appointed for parolees at all. *Id.* The regime contemplated by the Proposed Rule would leave parolees with disabilities and other functional impairments without any means of ensuring effective communication, as required by federal disabilities law. *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001). Under the system established in *Armstrong*, such assistance is rendered by specially trained appointed counsel. *Armstrong* Injunction, Ex. 3, at [paragraphs] 27, 30. In order for that assistance to be provided, however, counsel must be appointed before the parolee is asked to waive hearing rights and accept plea bargains. Providing counsel only after such waivers violates the basic disability law requirements for equal access to the courts. *See Tennessee* v. *Lane*, 541 U.S. 509, 533-534 (2004).	

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			• **Late and Insufficient Notice of Hearings to Supervised Persons Violates Federal Law** Under the proposed rule, the first time the State is required to provide any notice at all to the parolee is before the revocation hearing. Proposed Rule 4.540(e). There is absolutely no requirement to provide notice before the already Constitutionally-infirm *in absentia* probable cause review. This provision violates *Gagnon.* The *Gagnon* Court explained that *a preliminary hearing* must include a notice of the alleged violations. *Gagnon*, 411 U.S. at 782. Even with the notice of the revocation hearing under the proposed rule, there is no timing requirement for providing such a notice. *Gagnon* requires notice as early as the preliminary hearing. *Id.* Under the *Valdivia* Injunction, a parolee must be served with actual notice of the alleged parole violation no later than three days after the detention of the parolee. *See Valdivia* Injunction, Ex. 2, at [paragraph] 11(b)(iii). In the Proposed Rule, the parolee may be held for an indefinite period of time before being provided with any type of notice whatsoever. Although an individual is provided with some manner of notice before the revocation hearing under the Proposed Rule, the notice is	• As noted above, supervising agencies are authorized to conduct certain violation proceedings without court involvement. (Pen. Code, § 3454(b).) Courts are not involved in revocation proceedings until the supervising agency files a revocation petition with the court. After a petition is filed with the court, proposed rule 4.450(c)(4) ensures adequate notice because it requires the supervising agency to provide copies of the petition—which includes all relevant hearing information and a summary of the circumstances of the alleged violation—to the supervised person's counsel or, if unrepresented, to the supervised person *immediately upon filing of the petition.*

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			insufficient and unlawful. The Proposed Rule only requires that the notice include "the date, time, and place of any hearing related to the petition..." Proposed Rule 4.540(e). No provision is made for notice of the factual basis of the charges, or of the parolee's hearing rights, as required by *Morrissey* and *Gagnon. See Valdivia* Injunction, Ex. 2, [paragraph] 11(b)(iii). Shockingly, under the Proposed Rule, a parolee may be held for an indefinite period of time without being told the reason(s) for being held or even how long he or she could potentially be held. This is simply unlawful and violates a parolee's right to due process within the parole revocation system. • **Providing Revocation Hearings Within 45 days After Filing of the Petition is Insufficient and Unlawful Under Federal Law** The Proposed Rule revives the 45-day "unitary' hearing scheme previously found unconstitutional in *Valdivia.* Proposed Rule 4.540(g)(l). After a thorough analysis of the *Morrissey* and *Mathews* factors, the court in *Valdivia* held that a "delay of up to forty-five days or more before providing the parolee an opportunity to be heard regarding the reliability of the probable cause determination" violates a parolee's due process rights. *Valdivia,* 206 F.	• Please see the advisory committee response to the related comment in item #4 above.

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			Supp. 2d at 1078, Ex. l. As noted above, the Proposed Rule provides no deadline for filing the petition. Therefore, presumably, a parolee could be incarcerated pending a hearing for several days or weeks before a petition is filed and still must wait up to an additional forty-five days before being heard on the charges against him or her. The long delay in providing a revocation hearing-the sole hearing under the proposed rule, violates parolees' due process rights under *Morrissey, Gagnon,* and *Mathews. Compare Valdivia* Injunction, Ex, 2, at [paragraph] II(b)(iv) (providing for "a final revocation hearing on or before the 35th calendar day after the placement of the parole hold'). • **The Proposed Rule Fails to Provide for a Written Decision Memorializing the Revocation Proceedings** Minimal due process requires that the parolee receive "a summary, or digest, of what occurs at the [preliminary] hearing," and "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole" at the final revocation hearing. *Morrissey*, 408 U.S. at 487-89. The Proposed Rule, by contrast, omits any written decision. The harms caused by this omission are many. For example, without a record of the hearing result, the parolee can only guess at his release date. There would be no	• The committee agrees that written findings or an available hearing transcript is constitutionally required. Accordingly, the committee amended rule 4.540 to add subdivision (i): "If the court revokes community supervision, the court must summarize in writing the evidence relied on and the reasons for the revocation. A transcript of the hearing that contains the court's oral statement of the reasons and evidence relied on may serve as a substitute for written findings."

	Commentator	Position	Comment	Advisory Committee Response
			documentation provided afterward to confirm the parolee's recollections of what happened at the hearing. It is inappropriate and violates parolees' due process rights under federal case law and the federal Court *Valdivia* Injunction. • **The Proposed Rule Violates a Parolee's Fundamental Right to Confront Adverse Witnesses** The whole purpose of protecting due process in parole revocation is to prevent the harms to both the parolee and society that occur when parole is revoked based on unreliable information. Society and the parolee share an interest in proceedings that "assure that the finding of a parole violation will be based on verified facts." *Morrissey*, 408 U.S. at 484. To achieve this purpose, the federal Constitution guarantees that the parolee shall have the right to confront the evidence against them, and to test it by cross-examination. *Id.* at 487-488. At the probable cause hearing, confrontation is permitted unless the hearing officer "determines that an informant would be subjected to risk of harm if his identity were disclosed..." *Morrissey*, 408 U.S. at 487. At the final revocation hearing, confrontation is guaranteed, unless the hearing officer specifically finds good cause to deny confrontation. *Id.* at 489. The Proposed Rule, however, would sweep	• See the advisory committee response to the related comment in item #1 above.

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			away the ancient right of cross-examination, and replace it with a regime in which the parolee can be returned to prison on hearsay, rumor, and innuendo. Proposed Rule 4.540(g)(2) states the following unlawful and unconstitutional standard: "[a]dmission of the recorded or hearsay statement of a witness [at a revocation hearing] must not be construed to create a right to confront the witness at the hearing." Decades of federal and California authority confirm the central place of cross-examination in the parole revocation hearing. While the parolee's right to confront is different from the absolute Sixth Amendment confrontation right in criminal trials, the parolee's right, nevertheless, may not be dispensed with lightly, or swept away by a one-size-fits-all rule of court. Instead, the parolee's confrontation right requires a case-by-case balancing of the reliability of a particular out-of-court statement, its importance to the particular revocation charges, the parolee's interest in confrontation, and the government's reasons for not producing the witness. This careful balancing has been mandated by federal and state cases for decades. *See United States* v. *Simmons*, 812 F .2d 561, 564 (9th Cir. 1987); *United States* v. *Hall*, 419 F .3d 980, 986 (9th Cir. 2005) (same); *United States* v. *Comito*, 177 F.3d 1166 (9th Cir. 1999); *United States* v. *Walker*, *117* F.3d 417, 420 (9th Cir. 1997) (same); *United States* v. *Martin*, 984 F .2d 308, 310 (9th Cir. 1993) (same); Fed. R.	

	Commentator	Position	Comment	Advisory Committee Response
			Crim. P. 32. 1 (b)(2)(C) & Advisory Committee Note to 2002 Amendment ("[T]he court should apply a balancing test at the hearing itself when considering the releasee's asserted right to cross-examine adverse witnesses. The court is to balance the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it."); *In re Miller*, 52 Cal. Rptr. 3d 256, 266 (Cal. Ct. App. 2006); *People* v. *Shepherd*, 60 Cal. Rptr. 3d 616 (Cal. Ct. App. 2007); and *People* v. *Arreola*, 7 Cal. 4th at 1160 (1994) (holding that the courts must "balanc[e] the defendant's need for confrontation against the prosecution's showing of good cause for dispensing with confrontation"). The Ninth Circuit has recently affirmed that state parole revocation proceedings must provide for confrontation and cross-examination of adverse witnesses. The Ninth Circuit specifically rejected a blanket rule that would have admitted hearsay statements without examination of the specific circumstances. *Valdivia* v. *Schwarzenegger*, 599 F.3d 984, 988-995 (9th Cir. 2010), *cert. denied*, *Brown* v. *Valdivia*, 131 S. Ct. 1626 (2011). **III. CONCLUSION** The Proposed Rule violates existing federal law and two federal Court Injunctions in numerous ways. It is unlawful and unconstitutional and,	

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			therefore, must not be adopted by the Judicial Council. Instead, we recommend that this version of the rule be scrapped and that the Judicial Council engage in a more considered process to devise rules that are consistent with due process and fundamental fairness. The parole revocation process has been the subject of extensive study and review by the courts, civil rights litigators, and legal scholars. These stakeholders can be usefully engaged in the drafting of a new set of rules. We would be pleased to consult with you in this process in order to secure a fair system for our clients and the people of California.	
28.	Sacramento County District Attorney Ms. Cynthia G. Besemer Chief Deputy District Attorney	A	• To clarify: [I]t appears that the probable cause review is not a hearing but a paper review similar to the probable cause review after a probable cause arrest. However, that is not entirely clear. • It is also unclear as to whether or not the "supervising agency" or the "prosecutor" presents the evidence at the revocation hearing. It would appear that if the "prosecutor" receives notice of all the actions once a petition is filed, it would be the prosecutor who presents the matter but nowhere is that stated.	• Please see the advisory committee response to the related comment in item #6 above. • Prosecutors must present evidence. The realignment legislation does not authorize representatives of the supervising agency to present evidence at formal revocation hearings.

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			• We also believe the Victims' Bill of Rights applies to revocation hearings. If the victim of any crime makes a request for "notice" then whether they are the victim of the underlying offense, or the victim of the conduct leading to petition to revoke community supervision, then they are entitled to "notice" and a right to be present at any public proceeding at which the defendant and prosecutor are entitled to be present. These revocation proceedings fit the definition of a public proceeding at "which the defendant and prosecutor are entitled to be present" (right #7). It also meets the definition of "other disposition of the defendant" (right #12). Neither the Victims Bill of Rights, nor Penal code section 679.02 specifies who or what agency provides notice.	• Please see the advisory committee response to the related comment in item #2 above.
29.	Mr. Peter Fox San Joaquin County Public Defender	AM	Rule 4.540 (g)(2) as written is subject to constitutional challenge under [the] *Morrissey* and *Valdivia* decisions, which guarantee due process right of confrontation of witnesses at violation hearings.	Please see the advisory committee responses to the related comments in items #1 and #4 above.
30.	San Luis Obispo County District Attorney Mr. Timothy S. Covello Deputy District Attorney	AM	As drafted, proposed rules 4.540 and 4.541 and form CR-300 appear to fall short of the requirements to notify victims mandated [by] California Constitution Article I, Sections 28(b)(7), (b)(8) and (b)(12). Following are	The committee declines to amend the rules to require specific victim notice requirements as suggested for the reasons provided in the advisory committee response to the related comment in item #2 above. Additional responses are provided

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			proposed modifications to rules 4.540 and 4.541 and form CR-300. … • **Rule 4.540(b) Definitions.** Addition of Definition (b)(4) to read: "Victim" means the person(s) identified in the case for which the supervised person was convicted resulting in community supervision or any person allegedly victimized in connection with petition for revocation." • **Rule 4.540(c) Petition for revocation**. Item (c) (4) amended to read: "Upon filing the petition, the supervising agency must provide copies of the petition and written report to the prosecutor, any victims, and supervised person or the supervised person's counsel, if any." • **Rule 4.540(d) Probable Cause Review.** Item (d)(2) amended to read: **"**If the court determines that no probable cause exists to support the revocation, the court must dismiss the petition, vacate any scheduled hearings, and return the person to community supervision on the same terms and conditions. If the court dismisses the petition, the supervising agency must notify the prosecutor, any victims, supervised person, and supervised	below.

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All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Advisory Committee Response
			person's counsel, if any, of the dismissal." • **Rule 4.541(b) Minimum Contents.** Item (b)(1) amended to read: **"**Information about the supervised person, including (a) personal identifying information, including name and date of birth; (b) custody status and the date and circumstances of arrest; (c) any pending cases and case numbers; (d) the history and background of the supervised person, including a summary of the supervised person's record of prior criminal conduct; and (e) all relevant information concerning the defendant's social history, including family, education, employment, income, military, medical, psychological, and substance abuse information; and (f) the name of any victims of the supervised person (or identified in the criminal case) resulting in community supervision." **[Suggestions Regarding Form CR-300]** • Under INSTRUCTIONS, fourth bullet amended to read: "Upon filing the petition, petitioner must provide copies of the petition and written report to the prosecutor, any victims, and the supervised person or the supervised	• To protect victims' identities, the committee declines to require supervising agencies to include victim names in written reports attached to petitions.

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			person's counsel, if any. (Cal. Rules of Court, rule 4.540(c)(4).)" • Item #3. Conviction Information: Add to this section an area to be completed which includes: "Victim(s) in that case:"	• To protect victims' identities, the committee declines to require supervising agencies to include victim names on petitions.
31.	Santa Barbara County Probation Department Ms. Beverly A. Taylor Deputy Chief Probation Officer	AM	The information requested in section (b)(1) of the proposed rule 4.541 appears to be redundant to the information contained in the current sentencing reports prepared by probation departments for the Courts. It is recommended that this information could be more easily addressed by allowing the supervising agency to reference a previously filed sentencing report or by attaching the sentencing report which was prepared in another jurisdiction.	Please see the advisory committee responses to the related comments in items #6 and #7 above.
32.	Santa Clara County Public Defender Ms. Nancy Brewer Assistant Public Defender	AM	This comment relates to Proposed Rule 4.540(c)(2)(A) which states that "[t]he supervising agency has established probable cause to believe the supervised person has violated a term or condition of community supervision." Because it is the court that determines whether probable cause has been established, according to 4.540(d), it seems that this would be better worded as: "The supervising agency has SET FORTH CIRCUMSTANCE IN SUPPORT OF probable cause to believe the supervised person has violated a term or condition of community supervision." That's my two cents!	Please see the advisory committee response to the related comment in item #4 above.

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33.	Superior Court of Monterey County Hon. Timothy P. Roberts Presiding Judge	AM	The language should also include a mechanism for issuing a bench warrant for those individuals who never report to Probation after being released from CDCR.	The committee declines the suggestion because legislation enacted after this proposal circulated for public comment added Penal Code section 3455(a)(4) to authorize courts and hearings offciers to issue warrants.
34.	Superior Court of Orange County Ms. Erin Rigby Ms. Anabel Romero Criminal Unit Managers	AM	**[Suggestions Regarding Rule 4.540]** • [The t]itle should read "Revocation of Postrelease Community Supervision and Postrelease State Parole Supervision." • [Regarding subdivision (a)]: [A]dd "and postrelease parole supervision under Penal Code section XXX" after the word "supervision." • [Regarding subdivision (b)(1)]: [A]dd "or any person under state parole supervision under Penal Code section XXX" at the end of the line. • [Regarding subdivision (c)(4)]: Question: Is there a requirement for a proof of service to the supervised person, his counsel, or prosecutor?	• The committee declines all suggestions to apply the provisions of the proposed rules and form to state parole revocation procedures as premature. Court involvement in state parole revocation procedures does not begin until July 1, 2013. • Please see above. • Please see above. • Proposed rule 4.540(c)(4) does not require written proof of service.

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			• [Regarding subdivision (d)(1)]: Suggest giving the court 10 court days to review and rule on the petition.	• The committee declines the suggestion because the proposed 5-court-day deadline promotes timely due process.
			• [Regarding subdivision (d)(2)]: Should read "… the person to community supervision under the same terms…" Add: "The supervising agency must notify the prosecutor, supervised person, and supervised person's counsel, if any, of the findings. If the court dismisses the…"	• The committee declines the suggestion as unnecessary. Courts will determine the most appropriate method for notifying the parties of the results of the court's probable cause determinations.
			• [Regarding subdivision (e)]: The rule doesn't specify how much notice should be given. Should be 10 court days.	• The committee appreciates but declines the suggestion in favor of authorizing courts to determine the appropriate amount of notice of hearings.
			• [Regarding subdivision (f)]: Should the waiver be done in open court at the hearing set for the petition? Suggest adding: "The supervising agency must provide notice to the court, prosecutor, and supervised person's counsel, if any, of the supervised person's appearance waiver and admission of violation and request that the hearing be vacated." Is there another form for the waiver?	• The proposed rule is designed to provide courts with broad discretion to determine the most appropriate method for supervising persons to waive formal hearings. In addition, the committee will separately consider developing a Judicial Council form to facilitate waivers.
			[Suggestions Regarding CR-300]:	
			• "Court Number" should read	• Agreed. The heading of the form is

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			"Court/Case Number."	revised to note "Court/Case Number."
			• [Regarding Item 2,] Custody status: Add space to provide custody location and/or a booking number.	• Agreed. Item #2 is amended to include booking number information. Item #2 already requires custody location.
			• Form should include space to indicate if an interpreter is needed and what language.	• Agreed. Item #1 is amended to require interpreter information.
			• Form should include space for proof of service.	• The committee declines any formal proof of service requirements.
			• Lines are needed for the two date fields (declaration under penalty of perjury) and court's finding section.	• The committee declines the suggestion as unnecessary.
			• What is the intention of the box in the lower right corner? If it's for a court seal, should state at the bottom of the box.	• The box is intended for court seals. The committee declines the suggestion to maintain consistency with the format of other Judicial Council criminal law forms.
35.	Superior Court of Riverside County Mr. Michael J. Cappelli General Counsel	AM	• Rule 4.540(g)(2) expressly and unconditionally allows hearsay evidence at the formal revocation hearing and disclaims a right to confront witnesses. There is a body of case law that already addresses this area from a nuanced constitutional perspective. The absolute language of the proposed rule would be in conflict with such case law. (See, generally,	• Please see the advisory committee response to the comment in item #1 above.

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			People v. Arreola (1994) 7 Cal. 4th 1144, 1157-1158 [discussing U.S. Supreme Court and California precedent regarding the identical constitutional requirements for evidence at parole and probation revocation hearings wherein the court "emphasized that a showing of good cause for the admission of hearsay at a probation revocation hearing is "compelled by the due process requirements imposed by the United States Supreme Court"].) (*See, also, People v. Gomez* (2010) 181 Cal.App.4th 1028, 1039 ("Although the probation report would constitute testimonial hearsay under the expansive definition developed in recent confrontation clause cases, such as *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [174 L. Ed. 2d 314, 129 S.Ct. 2527], ***the confrontation clause is inapplicable to the probation revocation context.*** But within the parameters established by the body of precedent applicable to probation revocation, we conclude that the probation report was admissible and its admission did not violate defendant's due process right of confrontation"] (Emphasis added.).) Accordingly, we recommend that the rule not mention permissible evidence at all, or merely state that the same sort of evidence is	

	Commentator	Position	Comment	Advisory Committee Response
			allowed that would be admissible at a probation revocation hearing. As noted above, the limited confrontation right does not emanate from the Confrontation Clause. Rather, it is a due process right, which remains unaffected by opinions such as *Melendez-Diaz*. Hearsay in the nature of prior statements from a witness is generally inadmissible, but hearsay in the nature of written records is generally admissible. The proposed rule reads too absolute, saying without qualification that hearsay is admissible and there is no confrontation right. **[Suggestions Regarding Rule 4.540]** **…** • [Regarding the title]: Modify language as follows: "**Rule 4.540. Revocation of Postrelease Community Supervision *and Postrelease State Parole Supervision***." • Modify language in [subdivision] (a) as follows: "This rule applies to petitions for revocation of postrelease community supervision ***and postrelease parole supervision*** under Penal Code section 3455."	• The committee declines all suggestions to apply the provisions of the proposed rules and form to state parole revocation procedures as premature. Court involvement in state parole revocation procedures does not begin until July 1, 2013. • Please see above.

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			• Modify language in [subdivision] (b)(3) as follows: "Supervising agency" means the county agency designated as the supervising agency by the board of supervisors under Penal Code section 3451 ***for postrelease community supervision and the California Department of Corrections and Rehabilitation as the supervising parole agency for postrelease parole supervision.***"	• Please see above.
			• Modify language in [subdivision] (d)(2) as follows: "If the court determines that no probable cause exists to support the revocation, the court must dismiss the petition, vacate any scheduled hearings, and return the person to community supervision ***or parole supervision*** on the same terms and conditions. If the court dismisses the petition, the supervising agency must notify the prosecutor, supervised person, and supervised person's counsel, if any, of the dismissal."	• Please see above.
			• Modify language in [subdivision] (f) as follows: At any time before a formal hearing on the petition, the supervised person may waive a hearing and admit a violation. "***The supervising agency must provide notice to the court. Prosecutor, and the supervised***	• The committee appreciates but declines the suggestion. The proposed rule is designed to provide courts with broad discretion to determine the appropriate method of vacating scheduled hearings after waivers.

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			person's counsel (if any) to vacate the hearing date and quash the petition."	
			• Modify language of [subdivision] (h)(1) as follows: "If the court finds that the supervised person has not violated a term or condition of supervision, the court must dismiss the petition and return the supervised person to community supervision ***or parole supervision*** on the same terms and conditions."	• Please see the related response above.
			• Modify language of [subdivision] (h)(2)(A) as follows: "Return the supervised person to community supervision ***or parole supervision*** with modifications of conditions, if appropriate, including a period of incarceration in the county jail."	• Please see above.
			• Modify language of [subdivision] (h)(3) as follows: "Any confinement ordered by the court under subdivision ***(g)*** **[delete reference to (g) and replace with (h)]** ***(h)***(2)(A) and (B) must not exceed a period of 180 days in county jail."	• Agreed. Reference to subdivision (g) is a typographical error.
			[Regarding Rule 4.541]: [A]gree with proposed changes.	

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

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			With regards to proposed form CR-300:	
			• Modify language below heading "COURT'S FINDINGS AND ORDERS" as follows: "… does not find probable cause to support a revocation vacates any hearing dates and returns the supervised person to community supervision ***or parole supervision*** on the same terms and conditions…"	• The committee declines the suggestion as unnecessary.
			• Under HEARING INFORMATION, add: "Hearing Location ***(if address different from above entitled court):_____***"*[The above addition would assist with hearings conducted in non-court locations, e.g., jail facilities.]*	• Agreed. The committee amended the form to require petitioners to note the location of the hearing in item #1 if different than the court address in the heading.
			• Add: "***Defendant requires interpreter (specify language)_____***"	• Agreed. Interpreter information is added to item #1.
			• Under CUSTODY STATUS, add: ***Custody Location: _____*** ***Booking Number: _____***	• Agreed. Booking number information is added to item #2.
			• Under CONVICTION INFORMATION, add: "The supervised person was originally convicted in the ***Superior Court of California, County of _____*** of the following offenses:	• Agreed. The county of conviction is now required in item #3.

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			• Add Optional Check Box: "***Copy of Sentencing Order attached" in lieu of writing out sentence.***"	• The committee declines the suggestion as unnecessary.
36.	Superior Court of San Diego County Mr. Michael M. Roddy Court Executive Officer	A	Typographical Correction: Proposed Rule 4.540 … subd. (h)(3) references "(g)(2)(A) and (B); ho (B)."	Agreed. The reference to subdivision (g) is a typographical error.
37.	Superior Court of Ventura County Ms. Cheryl Kanatzar Deputy Executive Officer	AM	• [Regarding rule 4.540(d)]: Probable Cause Review: Items 1 and 2 should be removed. The court will determine at the time of the hearing whether probable cause exists. A 5-day review by the judge is not necessary. • [Regarding rule 4.540(e)]: Notice of Hearing: Remove the requirement that the supervising agency be required to provide notice to the supervised person's counsel. • On the declarations and form CR-300: Supervising agencies should not have to declare anything under the penalty of perjury because they may not have personal knowledge to attest to the information, and they should not be required to notify a defense attorney. • Also on the form: Add a check box to [Item 3] stating : "See attached Report."	• Please see the advisory committee response to the related comment in item #4 above. • The committee declines the suggestion. Notice to defense counsel is necessary. • To address concerns that petitioners cannot attest personal knowledge of all the information contained in the petition, the committee revised the form to require the petitioner to verify accuracy "to the best of my information and belief." • The committee declines the suggestion as unnecessary.

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38.	Trinity County Probation Department Mr. Hal Ridlehuber Supervising Deputy Probation Officer	AM	The draft CR-300 looks fine on its face. Our agency's concern however is that Rule 4.541(b) "Minimum Contents" requires far too much information. It is basically requiring all the same information on an offender that is put into a current pre-sentence report which takes several hours to complete. The draft CR-300, Sections 1-5, do not seem to require near the amount of information required under Rule 4.451, so the Petition and the Rule really aren't consistent.	Please see the advisory committee comment to the related comment in item #6 above.
39.	Hon. Richard A. Vlavianos Superior Court of San Joaquin County	AM	• I was on a working group that was tasked with working with the Governor and Legislature on this issue. One point that was very evident throughout our discussions is that different courts have very differing ideas about the system they want to run, and very different needs. The proposed rule, however, mandates a system that only meets the desires of some courts and is not responsive to the needs and desires of others. While some courts want to run a more administrative system like what is put forth in the proposed rule, other courts want to use the system currently in place to handle violations of probation for these cases. Currently, there is no legal impediment for a court to use their violation of probation system to meet their needs with these cases. The proposed rule, however,	• As stated in the advisory committee comment to the rule, the committee acknowledges that the practices related to the scheduling of court appearances vary from county to county. Nothing in the rule is intended to prohibit courts from scheduling court appearances according to local needs and customs, including requiring court appearances before formal evidentiary hearings on the petition to revoke. Rule 4.540 is designed to prescribe minimal procedural requirements to assist courts in implementing the new revocation procedures while providing courts with broad discretion to conduct the proceedings in accordance with local needs and customs, including existing probation revocation procedures. The committee added several advisory committee comments to emphasize court

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			would create one making for very bad policy in my opinion. In the working group, despite very lively discussions, the one thing that everyone uniformly agreed upon was that any law or rule of court must be flexible enough to allow for courts with vastly different desires and needs to put into place a system that will work for them. The proposed rule does not do that and needs to be amended to provide flexibility for courts that plan on using their system for violations of probation to handle these cases to do so in order to meet the needs of all courts. In that regard I would ask that the Committee consider prefacing the rule with language that indicates that a court may elect to use the procedure in place for processing violations of probation to handle these cases or, in the alternative, the proposed rule would apply. This would allow courts with differing needs to design the system that works best for them rather than mandating a one size fits all approach. • There are also some practical applications that will make the rule bad policy and should be addressed in my opinion. As written, Sections (c)(2)(C) and (c)(2)(D) of Proposed Rule 4.540 would provide for immunity for	discretion to conduct the proceedings according to local needs, including: "**Subdivision (c)(2)(C)**. This subdivision is designed to ensure that indigent supervised persons who desire counsel are represented as early in the revocation proceedings as possible. *Nothing in this subdivision is intended to infringe on court authority to appoint counsel or allow a supervised person to waive the right to counsel*… **Subdivision (d)**. This subdivision requires courts to review the supervising agency's probable cause determination required under subdivision (c)(2)(A). Courts may determine the most appropriate manner to review the supervising agency's probable cause determination. Nothing in this subdivision is intended to prevent courts from conducting formal hearings to review probable cause." (Italics added.) • Please see the above response and advisory committee responses to the related comments in items #5 above (regarding the deletion of rule 4.540(c)(2)(D)) and #16 (regarding court authority to issue warrants).

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			absconders. Under the proposed rule there can be no petition for revocation filed with the court unless the supervising agency has: informed the supervised person that he or she is entitled to counsel; made a referral to an attorney if desired; and proposed a sanction. Also, the petition for revocation cannot be filed until the supervised person has: denied the violation; declined to accept the proposed sanction; and declined to waive a court hearing. If the supervised person has absconded, the supervising agency cannot meet these obligations and, therefore, under the proposed rule cannot file a petition for revocation. Absent the allegation, the court cannot issue a warrant. The practical effect will be immunity from revocation for individuals who chose to abscond. Also, I believe that the other requirements that are brought in by the rule relating to the time frame and probable cause requirements set a dangerous precedent. Since probation is going to be the supervising agency almost everywhere, there would be no reason that these same requirements should not then be required for violations of probation. The proposed rule would open up that argument and potentially add obligations that are not currently	

	Commentator	Position	Comment	Advisory Committee Response
			required for violations of probation. This would place additional burdens on courts in times of very limited resources.	
40.	Mr. Paul M. Wellenkamp Attorney Hayward, California	NI	I have two comments: • First, concerns about the privacy of the information contained in the Supervising Agency Reports (Rule 4.541). Such information, including criminal history, family history, medical, and psychological history traditionally has been private and can be misused. As a parole record, the information was unavailable to the public. As a court record, I am concerned that it will be available. It should be under confidential seal and segregated from the publicly-available court file concerning the action. • Second, the 45-day time limit for the revocation hearing (Rule 4.540(g)) may turn out to be unworkable. If the person is taken into custody, and if the petition must be filed simultaneously, then conducting the hearing within 45 days of when the person was taken into custody works. If the person is out of custody, at large and not before the court, then the time limit (45 days after the filing of the petition) makes little	• Public access to probation reports is limited under Penal Code section 1203.05. The legislature, however, did not amend section 1203.05 to also limit public access to supervising agency reports related to community supervision revocation proceedings. In the absence of statutory authority that expressly requires confidentiality, supervising agency reports are presumptively public in nature. • Please see the advisory committee response to the related comment in item #4 above.

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			sense. A related concern is that there does not appear to be a time limit for filing the petition. The 45-day time limit only works if the petition is filed immediately after a person is taken into custody. If there is no time limit for filing the petition, then the 45 day limitation for a hearing has little practical meaning. The person could be held indefinitely, so long as the hearing is held within 45 days of filing the petition. I am not familiar with the Realignment scheme, so I hope that my concerns are answered in other parts of it. Thank you for this opportunity to be heard.	
41.	Yolo County Probation Department Mr. William Oneto Senior Probation Officer	AM	Rule 4.540 subdivision(C)(2)(D), it appears that the Supervising Agency MUST recommend a sanction in every instance, and that the supervised person MUST decline to accept the proposed sanction before a petition for revocation can be filed? Does this preclude the Supervising Agency from filing a petition for revocation if a sanction is not recommended? Must the Supervising Agency propose a sanction if our violation of probation matrix warrants the sanction to be a revocation?	Please see the advisory committee response to the related comment in item #5 above regarding the deletion of rule 4.540(c)(2)(D).
42.	Yuba County Probation Department		We have no objection to Rule 4.540 and form CR-300, our issue is with Rule 4.451. The rule requires that a report be filed with the petition	Please see the advisory committee response to the related comment in item #6 above.

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			that reports virtually everything that goes in a pre-sentence report absent Rules of Court. It would also require a summary of his/her performance under supervision. This would result in an eight to ten page report. Some of the background information has no bearing whether he is in compliance with his conditions at this stage of the violation proceeding. I can envision an officer doing all this work, only to have the petition denied. This is a tremendous amount of unnecessary work on part of the supervising officer that will have the end result of creating a disincentive to properly supervise the offender. The report should only be necessary after a finding on the violation and before sentencing. If the intent of the Court is to limit revocations this will definitely achieve that goal and do so at the cost of public safety. If this rule is not modified, the quality of the information in the report will be compromised to the point the report will be useless.	

ATTACHMENT

A

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EASTERN DISTRICT OF CALIFORNIA
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BINGHAM McCUTCHEN
KAREN KENNARD – 141925
KRISTEN A. PALUMBO - 215857
Three Embarcadero Center
San Francisco, California 94111-4067
Telephone: (415) 393-2000

PRISON LAW OFFICE
DONALD SPECTER – 83925
General Delivery
San Quentin, California 94964
Telephone: (415) 457-9144

ROSEN, BIEN & ASARO, LLP
MICHAEL W. BIEN – 096891
ERNEST GALVAN – 196065
MARI L. WILLITS – 209612
155 Montgomery Street, 8th Floor
San Francisco, California 94104
Telephone (415) 433-6830

STEPHEN J. PERRELLO, JR. – 56288
P.O. Box 880738
San Diego, California 92618
Telephone: (858) 277-5900

ALEX LANDON – 50957
2442 Fourth Avenue
San Diego, California 92101
Telephone: (619) 232-6022

Attorneys for Plaintiffs

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JERRY VALDIVIA, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

No. Civ. S-94-0671 LKK/GGH

STIPULATED ORDER FOR PERMANENT INJUNCTIVE RELIEF

ORIGINAL

1034

I. INTRODUCTION

1. This action was filed on May 2, 1994. Plaintiffs, on behalf of themselves and the class they represent, challenged the constitutionality of parole revocation procedures conducted by the California Board of Prison Terms ("BPT") and the California Department of Corrections ("CDC").

2. The Court certified this case as a class action by order dated December 1, 1994. The Plaintiff class consists of the following persons: (1) California parolees who are at large; (2) California parolees in custody as alleged parole violators, and who are awaiting revocation of their state parole; and (3) California parolees who are in custody, having been found in violation of parole and sentenced to prison custody.

3. The Defendants are state officials responsible for the policies and procedures by which California conducts parole revocation proceedings.

4. On June 13, 2002, this Court granted partial summary judgment in favor of Plaintiffs, holding that California's unitary parole revocation system violates the due process rights of the Plaintiff class under Morrissey v. Brewer, 408 U.S. 481 (1972), Gagnon v. Scarpelli, 411 U.S. 778 (1973), and related authority. The Court held that California's parole revocation system violated the due process clause of the Fourteenth Amendment by "allowing a delay of up to forty-five days or more before providing the parolee an opportunity to be heard regarding the reliability of the probable cause determination." Valdivia v. Davis, 206 F. Supp. 2d 1068, 1078 (E.D. Cal. 2002).

5. The parties stipulate that this is not a "civil case with respect to prison conditions," as those terms are defined and applied in the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626, and that therefore this Order is not governed by the PLRA.

6. The parties hereby stipulate that the Court shall ADJUDGE, DECLARE, AND DECREE as follows:

II. PARTIES

7. The Plaintiff class consists of the following persons: (1) California parolees who are at large; (2) California parolees in custody as alleged parole violators, and who are awaiting revocation of their state parole; and (3) California parolees who are in custody, having been found in violation of parole and sentenced to prison custody.

8. The Defendants are state officials responsible for the policies and procedures by which California conducts parole revocation proceedings. Defendant Arnold Schwarzenegger is Governor of the State of California and Chief Executive of the state government. Defendant Roderick Q. Hickman is the Secretary of the California Youth and Adult Correctional Agency. Defendant Edward S. Alameida, Jr., is Director of the California Department of Corrections. Defendant Richard Rimmer is Deputy Director of the California Department of Corrections, Parole and Community Services Division ("P&CSD"). Defendant Carol A. Daly is a Commissioner and Chair of the Board of Prison Terms ("BPT"). Defendants Alfred R. Angele, Sharon Lawin, Booker T. Welch, Jones M. Moore, and Kenneth L. Risen are Commissioners of the BPT. Defendant Kenneth E. Cater is Chief Deputy Commissioner of the BPT.

III. DEFINITIONS

9. The following terms when used in this Order shall have the meanings specified below:

(a) "Parolee(s)" shall mean any member of the Plaintiff class.

(b) "Day(s)" shall mean calendar days, unless otherwise specified.

(c) "Revocation process" or "revocation proceedings" shall mean all stages of the process by which parole may be revoked, including placement of a parole hold, notice, waivers, service of Return to Custody Assessments, and hearings.

(d) "Return to Custody Assessments" ("RTCAs") shall mean the practice by which Defendants offer a parolee a specific disposition in return for a waiver of the

parolee's right to a preliminary or final revocation hearing, or both.

(e) "Parole hold" shall mean any invocation by Defendants of their authority to involuntarily detain a parolee for revocation proceedings under Section 3056 of the California Penal Code. This term shall not apply to the detention of a parolee who has absconded from the State of California until he or she is physically returned to the State of California and is in its custody.

IV. POLICIES, PROCEDURES, FORMS, AND PLANS

10. For all policies, procedures, forms, and plans developed under this Order, the parties shall use the following process: Defendants shall meet periodically with Plaintiffs' counsel to discuss their development of policies, procedures, forms, and plans. In preparation for such meetings, Defendants will provide Plaintiffs' counsel with copies of the proposed policies, procedures, forms, and plans in draft form no later than 7 days before the meeting. If the parties reach an impasse on any particular issues, they may bring the disputed issues to the Court in a motion to be heard on shortened time.

11. Using the procedure set forth above in Paragraph 10, Defendants shall do the following:

(a) Defendants shall develop and implement sufficiently specific Policies and Procedures that will ensure continuous compliance with all of the requirements of this Order. The Policies and Procedures will provide for implementation of the August 21, 2003 Remedial Plan Outline (attached hereto as Exhibit A), as well as the requirements set forth below in Paragraphs 12–24. Defendants shall submit the completed Policies and Procedures to the Court no later than July 1, 2004.

(b) By July 1, 2004, Defendants shall begin implementing the following steps in the parole revocation process, which shall be completely implemented by January 1, 2005:

(i) Defendants shall appoint counsel for all parolees beginning at the

RTCA stage of the revocation proceeding. Defendants shall provide an expedited probable cause hearing upon a sufficient offer of proof by appointed counsel that there is a complete defense to all parole violation charges that are the basis of the parole hold.

(ii) No later than 48 hours after the parole hold, or no later than the next business day if the hold is placed on a weekend or holiday, the parole agent and unit supervisor will confer to determine whether probable cause exists to continue the parole hold, and will document their determination.

(iii) If the parole hold is continued thereafter, no later than 3 business days after the placement of the hold, the parolee will be served with actual notice of the alleged parole violation, including a short factual summary of the charged conduct and written notice of the parolee's rights regarding the revocation process and timeframes.

(iv) For all parolees who do not waive or seek a continuance of a final revocation hearing, Defendants shall provide a final revocation hearing on or before the 35th calendar day after the placement of the parole hold.

(c) By July 1, 2004, Defendants shall serve on counsel for Plaintiffs an assessment of the availability of facilities and a plan to provide hearing space for separate probable cause hearings.

(d) By July 1, 2005, in addition to the steps listed above, for all parolees who do not waive or seek a continuance of a probable cause hearing, Defendants shall provide a hearing to determine probable cause no later than 10 business days after the parolee has been served with notice of the charges and rights (at the 3rd business day after the placement of the hold).

(e) Defendants shall complete implementation of the Policies and Procedures by July 1, 2005.

12. In addition to the provisions of the August 21, 2003 Remedial Plan Outline, the Policies and Procedures shall ensure that the following requirements are met:

13. At the time of appointment, counsel appointed to represent parolees who have difficulty in communicating or participating in revocation proceedings, shall be

informed of the nature of the difficulty, including but not limited to: mental illness, other cognitive or communication impairments, illiteracy, limited English-language proficiency, and the need for a foreign language interpreter. The appointment shall allow counsel adequate time to represent the parolee properly at each stage of the proceeding.

14. At the time of appointment, counsel shall be provided with all non-confidential reports and any other documents that the state intends to rely upon at the probable cause or final revocation hearing. After appointment, if the state learns of additional evidence or documents, and intends to rely on such additional evidence or documents, it shall produce them to counsel as soon as practicable before the hearing.

15. Defendants shall develop and implement policies and procedures for the designation of information as confidential that are consistent with the requirements of due process.

16. Non-confidential portions of parolees' field files shall be available to parolees' counsel unless good cause exists for failure to provide access to such files. Field file information shall be withheld from counsel as confidential only in accordance with the policies and procedures referenced in Paragraph 15.

17. Defendants shall develop standards, guidelines, and training for effective assistance of state appointed counsel in the parole revocation process.

18. Defendants will ensure that parolees receive effective communication throughout the entire revocation process.

19. Defendants will ensure that all BPT and CDC forms provided to parolees are reviewed for accuracy and are simplified to the extent possible through a procedure similar to that used to revise forms in Armstrong v. Davis, C94-2307 CW (N.D. Cal.). This process will include translation of forms to Spanish. Revised forms will be submitted to Plaintiffs' counsel for review prior to finalization, dissemination, or modification.

20. Upon written request, parolees shall be provided access to tapes of parole

revocation hearings.

21. Parolees' counsel shall have the ability to subpoena and present witnesses and evidence to the same extent and under the same terms as the state.

22. At probable cause hearings, parolees shall be allowed to present evidence to defend or mitigate against the charges and proposed disposition. Such evidence shall be presented through documentary evidence or the charged parolee's testimony, either or both of which may include hearsay testimony.

23. Final revocation hearings shall occur within 35 calendar days of the parole hold.

24. The use of hearsay evidence shall be limited by the parolees' confrontation rights in the manner set forth under controlling law as currently stated in United States v. Comito, 177 F.3d 1166 (9th Cir. 1999). The Policies and Procedures shall include guidelines and standards derived from such law.

V. STAFFING LEVELS

Defendants shall maintain sufficient staffing levels in the CDC and BPT to meet all of the obligations of this Order.

VI. MONITORING

25. The parties shall cooperate so that Plaintiffs' counsel has access to the information reasonably necessary to monitor Defendants' compliance with this Order and the Policies and Procedures adopted in response thereto. Such information shall include but not be limited to: access to documents, tours, observation of parole revocation proceedings, observation of training sessions, interviews of staff, and interviews with parolees. Plaintiffs' counsel may notice depositions under the Federal Rules of Civil Procedure either: (1) if Plaintiffs' counsel are unable to obtain relevant information through interviews and informal document requests, or (2) after notifying Defendants of non-compliance with this Order under Section VII, below. Before

noticing a deposition, Plaintiffs' counsel must consult with opposing counsel about the deposition schedule so that the convenience of counsel, witnesses, and parties may be accommodated, if possible.

26. The parties shall meet regularly, and at least once every 90 days, to discuss implementation issues. At least once every 90 days, Defendants shall provide Plaintiffs' counsel with a report on hold-to-hearing time in substantially the same form, and with the same content as that currently used in Defendants' weekly "RSTS" meetings.

27. The parties shall agree on a mechanism for promptly addressing concerns raised by Plaintiffs' counsel regarding individual class members and emergencies.

VII. ENFORCEMENT

28. The Court shall retain jurisdiction to enforce the terms of this Order. The Court shall have the power to enforce the terms of this Order through specific performance and all other remedies permitted by law or equity.

29. If Plaintiffs' counsel believe that Defendants are not complying with any of the acts required by this Order, the Remedial Plans, or Policies and Procedures produced pursuant to it, they shall notify Defendants in writing of the facts supporting their belief. Defendants shall investigate the allegations and respond in writing within 30 days. If Plaintiffs' counsel are not satisfied with Defendants' response, the parties shall conduct negotiations to resolve the issue(s). If the parties are unable to resolve the issue(s) satisfactorily, Plaintiffs may move the Court for any relief permitted by law or equity.

VIII. ATTORNEY'S FEES AND COSTS

30. Plaintiffs are the prevailing party in this action. Plaintiffs' counsel may move for an award of reasonable attorney's fees and costs for obtaining relief for the Plaintiff class pursuant to 42 U.S.C. § 1988 or any other applicable law. Defendants shall pay Plaintiffs' counsel reasonable attorney's fees for work performed in connection with monitoring and enforcing this Order. The parties reserve the right to

address at a future date whether 42 U.S.C. § 1997e(d) applies to an award of attorney's fees in this suit.

IX. RESOLUTION OF CLAIMS

31. This stipulated order resolves all the claims in this case, except the following, to the extent that they are alleged in the Fifth Amended Complaint, if at all:

(a) Appeals. Plaintiffs assert that Defendants' administrative-appeals system for parole-revocation and revocation-extension decisions violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

(b) Revocation-Extension Proceedings. Plaintiffs assert that Defendants' policies, procedures, and practices for extending parole revocations based on alleged rules violations while in custody violate the Due Process Clause.

32. The parties anticipate that these issues will be resolved informally, without need for the Court's intervention. The parties will inform the Court if this does not occur.

IT IS SO STIPULATED.

Dated: November 12, 2003

ROSEN, BIEN & ASARO

By _____
MICHAEL BIEN

Dated: November 12, 2003

PRISON LAW OFFICE

By _____
DONALD SPECTER

Attorneys for Plaintiffs

Dated: November 17, 2003

BILL LOCKYER, Attorney General of the State of California,
ROBERT R. ANDERSON, Chief Assistant Attorney General,
FRANCES T. GRUNDER, Senior Assistant Attorney General,
JONATHAN L. WOLFF, Supervising Deputy Attorney General

By Thomas S. Patterson
THOMAS S. PATTERSON,
Deputy Attorney General
Attorneys for Defendants

Dated: November 17, 2003

By
RODERICK Q. HICKMAN
Secretary, Youth and Adult Correctional Agency

Dated: November 17, 2003

By E. S. Alameida
EDWARD S. ALAMEIDA, JR.
Director, California Department of Corrections

Dated: November 17, 2003

By Carol A. Daly
CAROL A. DALY
Chair, California Board of Prison Terms

ORDER

The Court finds that this is not a "civil case with respect to prison conditions," as those terms are defined and applied in the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626, and that therefore this Order is not governed by the PLRA. Defendants, their agents, employees, and successors in office are ordered to comply with all the terms stated above.

IT IS SO ORDERED

Dated: 3/8 Jde, 2004

LAWRENCE K. KARLTON
Chief Judge, Emeritus

BILL LOCKYER
Attorney General

COPY

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-5727
Facsimile: (415) 703-5843
E-Mail: Thomas.Patterson@doj.ca.gov

August 20, 2003

RECEIVED
AUG 22 2003
ROSEN BIEN & ASARO

The Honorable Lawrence K. Karlton
Chief Judge Emeritus
United States District Court, Eastern District
501 "I" Street
Sacramento, CA 95814

RE: Jerry Valdivia, et al. v. Gray Davis, et al.
USDC E.D. Cal., Case No. CIV-S-94-0671 LKK GGH P

Dear Judge Karlton:

The following is Defendants' revised remedial plan in this case. This plan represents a tremendous amount of work by the Defendants and other state officials since the July 23, 2003 order, much of which has been done recently while consulting Plaintiff's counsel.

Defendants continue to work with Plaintiffs' counsel to refine the revised remedial plan in efforts to perfect a viable revocation system that affords appropriate process.

With this in mind, neither Plaintiffs nor Defendants desire the Court to rule immediately on the adequacy of the revised remedial plan. Rather, they hope to resolve the issues soon and, of course, will advise the Court of the outcome of their efforts.

Sincerely,

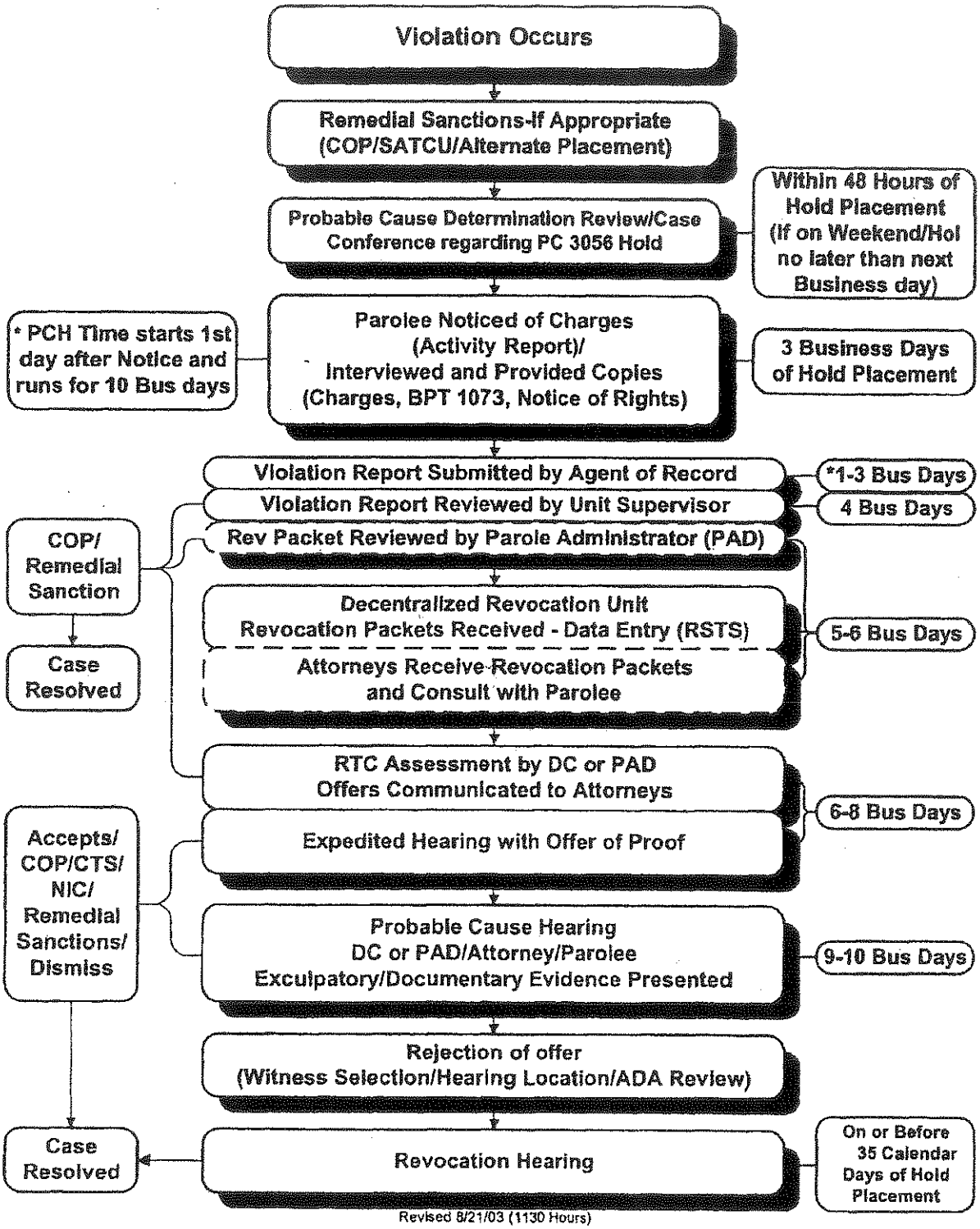
Thomas S. Patterson
THOMAS S. PATTERSON
Deputy Attorney General
Attorney for Defendants

For BILL LOCKYER
Attorney General

Donald Specter
DONALD SPECTER
Prison Law Office
Attorney for Plaintiffs

Exh A

Valdivia Remedial Plan



Revised 8/21/03 (1130 Hours)

VALDIVIA REMEDIAL PLAN POLICY OUTLINE

VIOLATION OCCURS

There are a myriad of circumstances under which a Parolee can violate his or her conditions of parole. There are approximately 100,000 parole violations referred to the Board of Prison Terms each calendar year.

Currently about 60% of the reported violations are the result of arrests by local law enforcement. Of that 60% arrested by local law enforcement, many are charged in the local jurisdictions for crimes against the state, while others are not charged locally but instead referred to the Board of Prison Terms for administrative disposition.

The remaining 40% are arrests that involve the Parole officer, which may also result in local charges or referral to the Board of Prison Terms for administrative disposition.

The average parole violator's term in prison is five and one half months.

Approximately 66% of the cases referred to the Board of Prison Terms are resolved prior to the revocation hearing. Last year, the Board of Prison Terms conducted approximately 37,000 revocation hearings.

REMEDIAL SANCTIONS

As part of the overall reform of the revocation process, the Parole and Community Services Division of the Department of Corrections will begin using remedial sanctions/community based treatment placement in January of 2004.

Some of the remedial sanctions/community based treatment programs that will be used are the Substance Abuse Treatment Control Units, Electronic Monitoring, Self-Help Outpatient/aftercare programs, and alternative placement in structured and supervised environments.

These remedial sanctions are not considered violations of parole because participation in the remedial sanctions program is voluntary and participation in the remedial sanctions program will not make the parolee presumptively ineligible for discharge at 13 months.

The goal is to reduce the number of returns to prison for violations of parole by up to 10% in 2004 and by up to 30% by 2006.

IF REMEDIAL SANCTIONS ARE DEEMED INAPPROPRIATE AND A PAROLE HOLD IS PLACED ON THE PAROLEE, A PROBABLE CAUSE DETERMINATION/REVIEW WILL TAKE PLACE WITHIN 48 HOURS OF THE HOLD AND IF THE HOLD IS PLACED ON A WEEKEND OR HOLIDAY, THE PROBABLE CAUSE REVIEW WILL BE CONDUCTED NO LATER THAN THE NEXT BUSINESS DAY FOLLOWING THE HOLD BEING PLACED.

Although this probable cause review for parolees is not required under any of the current, relevant case law, it is being put in place in an attempt to take a second look at those individuals who have been placed into custody to determine if the "present danger to public safety" concern still exists or if remedial sanctions/community based treatment is possible at this juncture.

As an example, a parolee who was strung out on dope may have "dried out" sufficiently that he or she is no longer a danger to him or herself or the public and may be an appropriate candidate for community based treatment in a structured, supervised program.

Under such a scenario, the parolee would be released to a community based treatment program with the understanding that a specific condition of his or her release is the completion of the program and any other special conditions of parole that the Parole Agent deems appropriate.

Current regulation and case law require any special conditions of parole to have a nexus to the parolees' commitment offense or behavior.

PAROLEE IS GIVEN ACTUAL WRITTEN NOTICE OF CHARGES WITH A SHORT FACTUAL SUMMARY OF THE BEHAVIOR; THE NOTICE OF RIGHTS REGARDING THE REVOCATION PROCESS; AND THE BPT 1073 ADA DETERMINATION IS MADE VIA A FACE TO FACE INTERVIEW WITHIN 3 BUSINESS DAYS OF THE HOLD BEING PLACED.

If the remedial sanctions are deemed inappropriate, within three business days of the hold being placed, the parolee shall be served actual notice of the charges against him or her accompanied by a short factual summary of the behavior; he or she shall be interviewed; an a ADA determination shall be made; the BPT form 1073 shall be completed, and parolee shall be provided with a written notice of rights regarding the revocation process and time frames. (Hereinafter referred to as "notice.")

The principles of "effective communication" apply to the revocation process. ADA accommodation must be provided for all parolees when necessary. In addition, all forms shall be printed in Spanish and English and a Spanish speaking person shall be available to interpret and explain the forms to the parolee where necessary.

THE PROBABLE CAUSE HEARING SHALL BE CONDUCTED WITHIN 10 BUSINESS DAYS FOLLOWING THE DATE OF ACTUAL SERVICE OF THE NOTICE OF CHARGES, THE ADA DETERMINATION, AND THE NOTICE OF RIGHTS.

Within the first 3 days after the parolee has been served with notice, the violation report must be completed and submitted to the Parole Unit supervisor.

On or before the fourth business day, the Unit Supervisor must review the report and: (1) determine if there is sufficient basis for the revocation to go forward; (2) determine if the report is accurate, complete, and contains the correct Title 15 violation sections; and (3) review the report and consider whether or not remedial sanctions/community based treatment is appropriate in lieu of proceeding with referral to the Board of Prison Terms with a recommendation that the parolee be returned to prison.

On or before the 4th business day, the revocation packet is reviewed by the Parole Administrator to determine whether or not there is a sufficient basis for the case to move forward and whether or not Remedial Sanctions/Community Based Treatment is appropriate at this juncture.

On or before the 5th business day, the revocation packet is forwarded to the decentralized revocation unit where the parolee is being held.

On or before the 6th business day, the parolee (including non-Armstrong class members) shall be appointed an attorney and the attorney shall be provided with a copy of the revocation packet, which shall contain a signed copy of the notice of charges, notice of revocation of rights, and a completed BPT 1073.

Attorney shall meet with the Parolee, provide the parolee with a copy of the revocation packet, and shall communicate any offer or offers made by the Board of Prison Terms Deputy Commissioner/Parole Administrator prior to the probable cause hearing.

In the event the parolee can make a sufficient offer of proof of a complete defense to the charges the Board of Prison Terms Deputy Commissioner/Parole Administrator, an expedited Probable Cause Hearing with Documentary and/or live testimony shall be scheduled. As an example, if the parole has uncontroverted documentary evidence that he or she was in Santa Rita jail when this violation allegedly occurred in Los Angeles, parolee shall be allowed to present such evidence at an expedited probable cause hearing between the 6th and 8th business day or at the earliest time possible thereafter if parolee is unable to produce such evidence by the 6th to 8th day.

On or before the 6th to 8th business day, a return to custody assessment (an offer) is made by the Deputy Commissioner/Parole Administrator, and the offer shall be communicated to the parolee's attorney.

On or before the 10th business day, a Probable Cause Hearing shall be held with the Deputy Commissioner/Parole Administrator, the parolee, and parolee's attorney.

The Deputy Commissioner/Parole Administrator conducting the hearing shall be the same Deputy Commissioner/Parole Administrator who made the return to custody assessment (offer) where practicable.

Parolee shall be permitted to present documentary evidence and hearsay testimony by way of offer of proof through his or her attorney in mitigation or as a partial or complete defense to the charges and/or the proposed disposition.

The Deputy Commissioner/Parole Administrator shall have the complete range of options to resolve the case. (Continue on parole, credit for time served, release from custody with pending charges, remedial sanctions/community based treatment, reduce the offer downward, dismiss some or all of the charges)

The Deputy Commissioner shall not have the authority to adjust the return to custody assessment upward at or during the probable cause hearing.

Parolee shall have the right to waive time as to any of these hearing time constraints with or without good cause.

Attorney shall have the right to a continuance upon the showing of good cause in the absence of his or her client's consent in cases of emergency or illness or upon such other showing that the Deputy Commissioner/Parole Administrator can make a finding of good cause.

There shall be a written record of this proceeding and the basis for any decisions made therein.

It is not necessary that the Probable Cause Hearing be audio/video recorded.

If at the conclusion of the probable cause hearing, the parolee has rejected the offer, parolee shall provide the Deputy Commissioner/Parole Administrator with a list of witnesses he or she would like to call at the revocation hearing. The location of the hearing shall be determined (within 50 miles of the violation), and the Deputy Commissioner/Parole Administrator shall make an independent ADA accommodation determination.

REVOCATION HEARING

The revocation hearing shall be held at the earliest possible time and in no case later than 35 calendar days after the parole hold has been placed.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **JERRY VALDIVIA, et al. v. GRAY DAVIS, et al.**

No.: **USDC E.D. #CIV-S-94-0671 LKK GGH P**

I declare:

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

On August 21, 2003, I served the attached

DEFENDANTS' REVISED REMEDIAL PLAN

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, San Francisco, California 94102-7004, addressed as follows:

Michael W. Bien, Esq.
Rosen, Bien & Asaro
155 Montgomery Street, 8th Floor
San Francisco, CA 94104

Alexander L. Landon
Law Offices of Alex Landon
2442 Fourth Avenue
San Diego, CA 92101

Donald Specter
Prison Law Office
General Delivery
San Quentin, CA 94964

Karen Kennard
Kristen A. Palumbo
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067

Stephen J. Perrello, Jr.
P.O. Box 880738
San Diego, CA 92168

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 21, 2003, at San Francisco, California.

A. ALBANO
Declarant

Albano
Signature

40006164.wpd

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *Jerry Valdivia, et al. v. Gray Davis, et al.*

No.: **USDC, Eastern District of California, Case No. CIV-S-94-0671 LKK GGH P**

I declare:

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

On November 18, 2003, I served the attached

STIPULATED ORDER FOR PERMANENT INJUNCTIVE RELIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

Karen L. Kennard
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067

Alex Landon
Law Offices of Alex Landon
2442 Fourth Avenue
San Diego, CA 92101

Donald Specter
Prison Law Office
General Delivery
San Quentin, CA 94964

Stephen J. Perrello, Jr.
Law Offices of Stephen J. Perello
P.O. Box 880738
San Diego, CA 92168

Michael W. Bien
Rosen, Bien & Asaro
155 Montgomery Street, 8th Floor
San Francisco, CA 94104

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 18, 2003, at Sacramento, California.

R. Wells
Declarant

R Wells
Signature

10025232.wpd

United States District Court
for the
Eastern District of California
March 9, 2004

* * CERTIFICATE OF SERVICE * *

2:94-cv-00671

Valdivias

v.

Schwarzenegger

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on March 9, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

Stephen J Perrello Jr AR/LKK
Law Office of Stephen J Perrello
P O Box 880738
San Diego, CA 92168

Alexander L Landon
Law Offices of Alex Landon
2442 Fourth Avenue
San Diego, CA 92101

Karen Kennard
Bingham McCutchen LLP
Three Embarcadero Center
Suite 1800
San Francisco, CA 94111

Michael W Bien
Rosen Bien and Asaro
155 Montgomery Street
Eighth Floor
San Francisco, CA 94104

Donald Specter
Prison Law Office
General Delivery
San Quentin, CA 94964

William Vernon Cashdollar
Attorney General's Office for the State of California
PO Box 944255
1300 I Street
Suite 125
Sacramento, CA 94244-2550

Erika C Aljens
Attorney General's Office for the State of California
PO Box 944255
1300 I Street
Suite 125
Sacramento, CA 94244-2550

Benjamin Laurence Pavone
Law Office of Benjamin Pavone
7676 Hazard Center Drive
Fifth Floor
San Diego, CA 92108-4503

Thomas Stuart Patterson
California Attorney General's Office
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004

John T Philipsborn
Law Offices of John T Philipsborn
507 Polk Street
Suite 250
San Francisco, CA 94102

Kristen A Palumbo
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067

Peter D Nussbaum
Altshuler Berzon Nussbaum Rubin and Demain
177 Post Street
Suite 300
San Francisco, CA 94108

Mark F Adams
San Diego Criminal
Defense Bar Association
962 Fifth Avenue
Suite 214
San Diego, CA 92101

Michael J McCabe
Criminal Defense Lawyers
Club of San Diego
2442 Fourth Avenue
San Diego CA 92101

Jack L. Wagner, Clerk

by: Deputy Clerk

ATTACHMENT

B

COPY

PRISON LAW OFFICE
DONALD SPECTER, #83925
SARA NORMAN, #189536
General Delivery
San Quentin, CA 94964
Telephone: (415) 457-9144

McCUTCHEN DOYLE BROWN &ENERSEN
WARREN E. GEORGE, #53588
JENNIFER A. JONAK, #191323
Three Embarcadero Center
San Francisco, CA 94111-4066
Telephone: (415) 393-2000

ORIGINAL
FILED
FEB 11 2002
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.
ARLENE MAYERSON, #79310
2212 6th Street
Berkeley, CA 94710
Telephone: (510) 644-2555

ROSEN, BIEN & ASARO
MICHAEL W. BIEN, #96891
WILLIAM FERNHOLZ, #168278
155 Montgomery St., 8th Floor
San Francisco, CA 94104
Telephone: (415) 433-6830

PILLSBURY, MADISON & SUTRO LLP
SHAWN A. HANSON, #109321
CAROLINE MITCHELL, #143124
50 Fremont Street
San Francisco, CA 94105
Telephone: (415) 983-1000

LAW OFFICES OF ELAINE B. FEINGOLD
ELAINE B. FEINGOLD, #99226
1524 Scenic Ave.
Berkeley, CA 94708
Telephone: (510) 848-8125

RECEIVED
FEB - 6 2002
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RECEIVED
JUN 28 2002
ROSEN BIEN & ASARO

JOHN ARMSTRONG, et al.,

Plaintiffs,

v.

GRAY DAVIS, et al.,

Defendants.

No. C-94-2307-CW

STIPULATION AND ORDER ON REVISED INJUNCTION

Pursuant to the Court's Order of January 29, 2002, the parties have met and conferred regarding a revision of the Permanent Injunction issued in this case in order to meet the requirements stated by the Ninth Circuit in *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001).

The parties stipulate that the attached Revised Permanent Injunction meets the Ninth Circuit's requirements.

IT IS SO STIPULATED.

Dated: February 5, 2002

SARA NORMAN
Attorney for plaintiffs

Dated: February 6, 2002

FRANCES GRUNDER
Attorney for defendants

IT IS SO ORDERED.

Dated: _____

CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al.,

Plaintiffs,

v.

GRAY DAVIS, et al.,

Defendants.

No. C 94-02307 CW

REVISED PERMANENT INJUNCTION

Based on the Findings of Fact and Conclusions of Law filed herewith, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

Defendants Gray Davis, as Governor of the State of California, Robert Presley, as Secretary to the California Youth and Adult Corrections Agency, James Nielsen, as Chairman of the California Board of Prison Terms (BPT), and the BPT, and their agents, employees, successors in office and all persons acting in their aid or in participation with them are advised, enjoined and ordered as follows:

A. Introduction

1. Terms not expressly defined in this injunction shall have the meaning given to them by Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 et seq., and its implementing regulations, or if no meaning is provided therein, the meaning given to them by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing

regulations. Where no definition is provided by the ADA, Section 504 or their implementing regulations, terms shall be construed in accordance with ordinary principles of law, and particularly with reference to the record in this case.

2. "Prisoners and parolees with disabilities" refers to all current and future California State prisoners and parolees with mobility, hearing or sight impairments, or with developmental or learning disabilities, that substantially limit a major life activity.

3. "Parole proceedings" shall mean all hearings conducted by the BPT to determine whether and/or when a prisoner or parolee should be released on parole or involuntarily confined, including parole revocation and revocation extension hearings, life prisoner hearings (documentation hearings, progress hearings, parole consideration hearings, parole date rescission hearings and parole board rules hearings), mentally disordered offender hearings and sexually violent predator hearings. Parole proceedings also include any events related to the hearings that occur prior to or after the hearings, including, but not limited to, screening offers, psychological evaluations, central file reviews and administrative appeals.

B. Self-Evaluation and Transition Plan

4. Within ninety days of the date of this injunction, the BPT shall evaluate, pursuant to 28 C.F.R. § 35.105, all of the facilities in which parole proceedings are conducted to determine whether each facility complies with the ADA and its implementing regulations. The analysis shall not be limited to facilities owned

and operated by the BPT, but shall include all facilities in which parole proceedings are conducted. The evaluation shall include:

a. An accessibility survey of all parole facilities for which a complete accessibility survey has not been conducted. The accessibility survey need not duplicate the surveys of other governmental entities as long as the BPT takes reasonable steps to ensure that such surveys are accurate and reliable.

b. An analysis of the accessibility of each parole facility.

5. Immediately following its analysis of these facilities, the BPT shall provide to all relevant BPT and California Department of Corrections (CDC) personnel a list of the facilities that are not fully accessible. The list shall describe those parts of the facility that are not accessible and the disabilities that the facility cannot accommodate. Updated lists shall be distributed as changes occur.

6. The BPT shall thereafter draft a Transition Plan pursuant to 28 C.F.R. § 35.150(d). The Transition Plan must include the following:

a. For each facility in which parole proceedings are conducted, a description of any structural modifications that will be completed to make the parole proceedings conducted at that facility accessible or another accessible location in which the proceedings will be held.

b. A schedule for providing accessible proceedings for prisoners and parolees with disabilities at each facility, or at another, accessible location, as expeditiously as possible, but no

later than sixty days after the Transition Plan is submitted. These provisions require only that the BPT request that the CDC transport mobility impaired prisoners to accessible locations if the facilities at which they are housed are inadequate. The CDC may, for valid security or other penological reasons, decline to do so.

7. Parole revocation hearings shall be conducted at a location within fifty miles of the alleged violation that is readily accessible to and usable by parolees with disabilities.

8. Postponement of a parole proceeding due to the inaccessibility of a facility is not an acceptable alternative, except in extraordinary circumstances.

9. Within 150 days of the date of this injunction, Defendants shall submit their Transition Plan to Plaintiffs' counsel. Plaintiffs shall thereafter have thirty days to submit written comments and the parties shall negotiate in good faith to resolve any disagreements. If any disputes remain, Plaintiffs shall file a regularly noticed motion regarding the disputed issues within 210 days of the date of this injunction.

C. Policies and Procedures

10. The BPT shall develop and implement sufficiently specific policies and procedures that will ensure continuous compliance with all of the requirements of this injunction. Among other things, the policies and procedures will ensure that prisoners and parolees with disabilities are able to participate, to the best of their abilities, in any parole proceedings.

11. The policies shall include detailed procedures for

identifying prisoners and parolees with disabilities prior to or at the initiation of any parole proceeding.

12. The policies shall include detailed procedures for accommodating and effectively communicating with prisoners and parolees with disabilities at all parole proceedings.

13. A draft of the policies and procedures required by the preceding paragraph shall be submitted to Plaintiffs' counsel within sixty days of the date of this injunction. Plaintiffs shall thereafter have thirty days to submit written comments on the policies and procedures, and the parties shall negotiate in good faith to resolve any differences. If any disputes remain, Plaintiffs shall file a regularly noticed motion regarding the disputed issues within 150 days of the date of this injunction. The briefing of any such motion shall be consolidated with the briefing of any motions filed pursuant to paragraphs 21 and 23.

D. Training

14. Within 120 days of the date of this injunction, all BPT Commissioners, BPT Deputy Commissioners, BPT executive officers, BPT ADA coordinators, BPT appeals analysts, CDC District Hearing Agents, CDC correctional counselors and other BPT and CDC personnel who have direct or supervisory responsibility for communicating with or making decisions affecting prisoners and parolees in connection with parole proceedings shall receive adequate training in the general requirements of Title II of the ADA, disability awareness, the appropriate method of determining whether a prisoner with a disability adequately understands written and verbal communications, the circumstances that gave rise to this

injunction, its requirements and the BPT's policies and procedures developed pursuant to this injunction that are relevant to the individual's responsibilities.

The BPT shall provide training for all persons under its jurisdiction to the extent set forth in this paragraph; it shall also offer training to CDC staff involved in the parole and revocation process; should any CDC personnel decline such training, the BPT shall use its own personnel in their stead, except when the CDC requires that CDC employees perform the services involved.

E. Identification and Accommodation

15. The BPT shall create and maintain a system for tracking prisoners and parolees that the BPT identifies as having disabilities. However, to the extent that tracking is conducted by the CDC, it is not necessary for the BPT to duplicate that system, and the BPT may make use of the CDC's tracking system as a permissible means of complying with the injunction.

16. Prior to meeting with a prisoner or parolee about a screening offer, and prior to parole revocation, parole revocation extension, life prisoner parole date rescission, life prisoner parole consideration, serious offender, mentally disordered prisoner or sexually violent predator probable cause hearings, the BPT shall take reasonable steps to identify prisoners and parolees with disabilities. Such steps shall include, but not be limited to:

a. Checking the system described in paragraph 15 to determine whether the BPT has previously identified the prisoner or parolee as having a disability.

b. Reviewing all relevant and reasonably available information in the prisoner or parolee's central and medical files.

c. Verifying the disability when the BPT disputes the extent or existence of the disability. The prisoner or parolee shall be expected to cooperate with all verification efforts, but the BPT shall be responsible for verifying the disability.

17. The BPT shall provide accommodations to prisoners and parolees with disabilities at all parole proceedings. The prisoner or parolee's request for a particular type of accommodation shall be given primary consideration and shall be granted unless the request is unreasonable for specific, articulated reasons allowable under the ADA, or unless other effective accommodations are available.

18. The BPT shall hire at least one full-time ADA coordinator with expertise in Title II of the ADA, the identification of people with disabilities and the needs of people with disabilities, and shall ensure that this person is generally available during normal business hours to answer questions from and provide advice to District Hearing Agents and other BPT and CDC personnel. This person shall not be given duties that are not related to ADA compliance. If the BPT determines that employing a full-time ADA coordinator is unnecessary, it may seek relief from the Court by way of a regularly noticed motion, but in no event shall it file such a motion until the newly hired ADA coordinator has been employed for at least one year. The BPT shall bear the burden of demonstrating that other staffing methods are sufficient to ensure compliance with this injunction.

F. Forms

19. All BPT forms used by prisoners and parolees shall be revised so that they are written in simple English. Whenever prisoners or parolees with disabilities are given BPT forms that they cannot understand due to their disabilities, they shall be provided an accommodation to enable them to understand the forms to the best of their abilities.

20. All BPT forms provided to prisoners and parolees shall be readily available in alternative formats, including, but not limited to, large print, Braille and audio tape.

21. All revisions to forms required by this injunction shall be submitted to Plaintiffs' counsel within sixty days of the date of this injunction. Plaintiffs shall thereafter have thirty days to submit written comments and the parties shall negotiate in good faith to resolve any disagreements. If any disputes remain, Plaintiffs shall file a regularly noticed motion regarding the disputed issues within 150 days of the date of this injunction. The briefing of any such motion shall be consolidated with the briefing of any motions filed pursuant to paragraphs 13 and 23.

G. Equipment

22. The BPT shall ensure that appropriate equipment is available to prisoners and parolees who need such equipment to communicate effectively at parole proceedings. Such equipment shall include, but not be limited to, assistive listening devices, computer readers and magnification devices.

23. The BPT shall provide Plaintiffs' counsel with a list of the available equipment and the places it is available within sixty

days of the date of this injunction. Plaintiffs shall have thirty days to submit written comments and the parties shall negotiate in good faith to resolve any disagreements. If any disputes remain, Plaintiffs shall file a regularly noticed motion regarding the disputed issues within 150 days of the date of this injunction. The briefing of any such motion shall be consolidated with the briefing of any motions filed pursuant to paragraphs 13 and 21.

H. Screening Process

24. The screening offer, and all relevant BPT forms, police reports and other written documents, shall be effectively communicated to prisoners or parolees with disabilities at least seventy-two hours in advance of the time at which they must decide whether to exercise any of their rights, including the right to request an attorney, and to accept or reject the screening offer.

25. Prisoners and parolees with disabilities shall be provided an accommodation at the screening process when that is necessary to ensure that the prisoner or parolee understands to the best of his or her ability all of his or her rights, the nature of the charges and the consequences of waiving any rights. Before a prisoner or parolee with a disability may waive a parole hearing or the right to an attorney, the BPT must determine that the waiver is knowing and intelligent.

26. When necessary to achieve effective communication, appropriate auxiliary aids or assistance must be provided to prisoners and parolees during the screening process. Such aids and assistance shall include, but not be limited to, sign language interpreters, assistive listening devices, readers and persons

trained to provide assistance to individuals with cognitive disabilities.

27. At its discretion, the BPT may appoint attorneys as an accommodation. In order to suffice as an accommodation, the attorneys must be adequately trained to provide accommodations to persons with disabilities and must receive adequate additional time for providing those services. Attorneys appointed to represent individuals with disabilities shall be informed of their clients' disabilities. If the BPT is aware that a prisoner or parolee requires certain specific accommodations, the BPT shall either instruct an attorney appointed to represent that prisoner or parolee to provide those specific accommodations, or shall provide the prisoner or parolee with those specific accommodations by some other means.

28. In lieu of providing assistance at the screening process, the BPT may refer the prisoner or parolee for a hearing with the necessary aids or assistance, provided that, absent any additional charges, the hearing is within thirty days of the parole hold and that any term of imprisonment imposed at a hearing does not exceed a typical screening offer for a similar violation.

I. Hearings

29. At its hearings, the BPT shall make accommodations for prisoners and parolees with disabilities and provide appropriate auxiliary aids and services necessary for effective communication. Such accommodations and auxiliary aids and services shall include, but not be limited to, sign language interpreters, assistive listening devices, readers and individuals trained to provide

assistance to persons with disabilities.

30. At its discretion, the BPT may appoint attorneys as an accommodation. In order to suffice as an accommodation, the attorneys must be adequately trained to provide accommodations to persons with disabilities and must receive adequate additional time for providing those services. Attorneys appointed to represent individuals with disabilities shall be informed of their clients' disabilities. If the BPT is aware that a prisoner or parolee requires certain specific accommodations, the BPT shall either instruct an attorney appointed to represent that prisoner or parolee to provide those specific accommodations, or shall provide the prisoner or parolee with those specific accommodations by some other means.

31. Hearing impaired prisoners and parolees who need sign language interpreters shall not have their hands and arms restrained in any way during the hearing, unless a written determination is made on an individualized basis that the prisoner or parolee would pose a direct threat if unrestrained and that there are no other reasonable alternatives available to protect against the threat. The Chairman of the BPT or his delegate shall personally approve the use of restraints in each such instance prior to their use.

32. The BPT shall make accommodations for prisoners and parolees with disabilities in order to assist them in preparing for parole proceedings. For example, if a prisoner or parolee is entitled to review his or her central file prior to a parole proceeding, and if that prisoner or parolee is unable, due to a

disability, adequately to review his or her central file without an accommodation, the BPT shall make such an accommodation. Where other preparation, including but not limited to participating in psychological interviews, obtaining letters of support and developing parole plans, is necessary prior to a parole proceeding, the BPT shall provide reasonable accommodations to prisoners or parolees with disabilities who require such accommodations adequately to complete such preparation.

J. Appeals

33. Prisoners and parolees with disabilities who cannot use or understand the appeal process or prepare an appeal themselves by reason of their disability shall be provided with effective assistance in preparing a BPT appeal.

K. Grievances

34. The BPT shall develop and implement a grievance procedure, separate from its current appeal procedure, for processing any complaints of denials of requests for accommodations. All grievances requesting reasonable accommodations at a scheduled hearing shall be decided before the hearing.

35. All administrative appeals alleging in substance violations of the ADA or its implementing regulations shall be treated as ADA grievances, and any successive appeal on the non-ADA merits of a decision shall not be deemed barred due to the filing of the ADA-related grievance or grievances. Except as otherwise provided in the immediately preceding paragraph, all such ADA-related appeals shall be decided within thirty days of the BPT's

receipt of the appeal form.

L. Programs

36. The BPT shall provide to all Commissioners and Deputy Commissioners who participate in life prisoner parole consideration hearings a list of CDC programs in which prisoners with disabilities can meaningfully participate, either without accommodation or with appropriate and readily available accommodation. This list shall specify the types of programs available, the particular disabilities the programs can accommodate and the prisons in which they are offered. This list shall be updated every six months.

37. At life prisoner parole consideration hearings, the BPT shall not recommend that prisoners participate in programs that are unavailable to them by reason of their disabilities and shall not rely on the failure of prisoners to participate in programs not available to them by reason of their disabilities as a factor supporting denial of a parole date or a multi-year denial.

38. Nothing in this section shall require the BPT to release a prisoner on parole who is otherwise unsuitable for release under California law.

M. Monitoring

39. The parties shall attempt negotiate a plan to monitor Defendants' compliance with this injunction. If such negotiations are unsuccessful, the Court shall consider the appointment of a Special Master. Within forty-five days of the date of this injunction, the parties shall file a joint and mutually acceptable plan for monitoring this injunction or separate briefs describing

each party's position on the need for a Special Master and the Court's authority to appoint one.

N. Enforcement

40. The Court shall retain jurisdiction to enforce the terms of this injunction.

41. No person who has notice of this injunction shall fail to comply with it, nor shall any person subvert the injunction by any sham, indirection or other artifice.

IT IS SO ORDERED.

Dated: FEB 11 2002

CLAUDIA WILKEN

CLAUDIA WILKEN
United States District Judge

Copies mailed to counsel
as noted on the following page

Penal Code section 3455

(a) If the supervising county agency has determined, following application of its assessment processes, that intermediate sanctions as authorized in subdivision (b) of Section 3454 are not appropriate, the supervising county agency shall petition the revocation hearing officer appointed pursuant to Section 71622.5 of the Government Code to revoke and terminate postrelease supervision. At any point during the process initiated pursuant to this section, a person may waive, in writing, his or her right to counsel, admit the violation of his or her postrelease supervision, waive a court hearing, and accept the proposed modification of his or her postrelease supervision. The petition shall include a written report that contains additional information regarding the petition, including the relevant terms and conditions of postrelease supervision, the circumstances of the alleged underlying violation, the history and background of the violator, and any recommendations. 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 postrelease supervision, the revocation hearing officer shall have authority to do all of the following:

(1) Return the person to postrelease supervision with modifications of conditions, if appropriate, including a period of incarceration in county jail.

(2) Revoke postrelease supervision and order the person to confinement in the county jail.

(3) Refer the person to a reentry court pursuant to Section 3015 or other evidence-based program in the court's discretion.

(4) At any time during the period of postrelease supervision, if any peace officer has probable cause to believe a person subject to postrelease community supervision is violating any term or condition of his or her release, the officer may, without a warrant or other process, arrest the person and bring him or her before the supervising county agency established by the county board of supervisors pursuant to subdivision (a) of Section 3451. Additionally, an officer employed by the supervising county agency may seek a warrant and a court or its designated hearing officer appointed pursuant to Section 71622.5 of the Government Code shall have the authority to issue a warrant for that person's arrest.

(5) The court or its designated hearing officer shall have the authority to issue a warrant for any person who is the subject of a petition filed under this section who has failed to appear for a hearing on the petition or for any reason in the interests of justice, or to remand to custody a person who does appear at a hearing on the petition for any reason in the interests of justice.

(b) The revocation hearing shall be held within a reasonable time after the filing of the revocation petition. Based upon a showing of a preponderance of the evidence that a person under supervision poses an unreasonable risk to public safety, or the person may not appear if released from custody, or for any reason in the interests of justice, the supervising county agency shall have the authority to make a determination whether the person should remain in custody

pending a revocation hearing, and upon that determination, may order the person confined pending a revocation hearing.

(c) Confinement pursuant to paragraphs (1) and (2) of subdivision (a) shall not exceed a period of 180 days in the county jail.

(d) A person shall not remain under supervision or in custody pursuant to this title on or after three years from the date of the person's initial entry onto postrelease supervision, except when a bench or arrest warrant has been issued by a court or its designated hearing officer and the person has not appeared. During the time the warrant is outstanding the supervision period shall be tolled and when the person appears before the court or its designated hearing officer the supervision period may be extended for a period equivalent to the time tolled.