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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JERRY VALDIVIA, ALFRED YANCY,  
and HOSSIE WELCH, on their own  
behalf and on behalf of the class  
of all persons similarly situated,

Plaintiffs,

v.

GRAY DAVIS, Governor of the State  
of California, et al.,

Defendants.

NO. CIV. S-94-671 LKK/GGH

O R D E R

**TO BE PUBLISHED**

Plaintiffs sue the Governor of the State of California, and  
various state correctional officials for allegedly maintaining  
parole revocation procedures which violate the Due Process Clause  
of the Fourteenth Amendment.<sup>1</sup> Plaintiffs now move for partial

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<sup>1</sup> Previously the court certified a class consisting of  
California parolees (1) who are at large; (2) who are in custody  
as alleged parole violators awaiting revocation of their parole  
status; or (3) who are in custody having been found in violation  
of parole.

1 summary judgment on their claim that the State's unitary parole  
2 revocation hearing system is unconstitutional.<sup>2</sup> I resolve the  
3 matter on the pleadings and evidence filed herein and after oral  
4 argument.

5 **I.**

6 **FACTS<sup>3</sup>**

7 Under California's system, a parole officer can impose a  
8 hold if the officer concludes that there is reasonable cause to  
9 believe the parolee has violated a condition of his parole and  
10 is a danger to himself, a danger to the person or property of  
11 another, or may abscond. A parole hold authorizes the detention  
12 of a parolee charged with an alleged parole violation pending a  
13 parole revocation hearing. The parole officer is not required  
14 to obtain an arrest warrant prior to placing the hold and taking  
15 the parolee into custody. Within seven days after detention  
16 pursuant to the parole hold, the parolee must be notified of the  
17 reasons for the hold.

18 As noted, California's process does not provide for a  
19 preliminary revocation hearing to determine whether there is  
20 probable cause to believe that a parolee committed a parole  
21 violation. Rather, California has adopted a wholly internal  
22 review system from which the parolee is entirely excluded.

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24 <sup>2</sup> By "unitary," the court means that the sole hearing  
25 accorded a parolee is directed to disposition of the alleged  
26 violation without a preliminary determination of probable cause.

<sup>3</sup> The facts contained herein are undisputed unless otherwise  
noted.

1 Following the placement hold, the parole officer has a case  
2 conference with the unit supervisor to review the decision to  
3 place the hold, and to determine a possible disposition.  
4 Thereafter, the parole officer prepares and files a parole  
5 violation report which is, after review by the unit supervisor,  
6 submitted to the Board of Prison Terms. The report contains  
7 information on the alleged parole violation and supporting  
8 evidence, a summary of the parolee's adjustment while on parole,  
9 and a recommendation as to what action should be taken.

10 Based on the parole violation report, a Board of Prison  
11 Terms' deputy commissioner determines the terms of a "screening  
12 offer" to be presented to the parolee. A "screening offer"  
13 tenders to the parolee a specific term of incarceration in  
14 exchange for the disposition of the case and a waiver of the  
15 parolee's right to have a revocation hearing.<sup>4</sup> When the deputy  
16 commissioner reviews the parole violation report to determine  
17 the appropriate screening offer, the parolee is neither present,  
18 nor has he had any opportunity to communicate with the deputy  
19 commissioner. Put directly, at no time prior to the  
20 determination of the screening offer has the parolee been given  
21 an opportunity to speak to the charges, challenge the contents

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22  
23 <sup>4</sup> The screening offer has the benefit to the parolee of  
24 providing a definite resolution of the alleged violation, which  
25 ordinarily is less severe than the potential sentence following a  
26 revocation hearing. Thus, the screening offer system presents a  
parolee who has not engaged in the charged conduct an inducement  
to, in effect, enter an "Alford" plea, i.e. admit to the charge in  
order to avoid a more severe consequence. See North Carolina v.  
Alford, 400 U.S. 25 (1970).

1 of the violation report, present his own evidence, or to  
2 question witnesses.

3       If the parolee accepts the screening offer, a revocation  
4 hearing is not held and thus the parolee has no chance to  
5 challenge either the parole hold or the charges. If the parolee  
6 does not accept the screening offer, a formal revocation hearing  
7 is scheduled where the parolee may then challenge the charge  
8 leading to the hold, rather than the parole hold. Pending the  
9 revocation hearing, parolees who are under a parole hold remain  
10 in custody.

11       In sum, at no time prior to the unitary revocation  
12 hearing, do parolees have an opportunity to present their  
13 position to an independent decision-maker or to challenge, in  
14 any manner, whether the parole officer had probable cause for  
15 the parole hold and resulting detention.

16       California's regulations suggest that the unitary  
17 revocation hearing for parole revocation be scheduled within  
18 forty-five days from the date the parole hold is placed. This  
19 forty-five day period is only advisory, See Cal. Code Regs.  
20 tit. 15, § 2640(f),<sup>5</sup> and can be extended if defendants determine  
21 a delay does not prejudice the parolee. Id.<sup>6</sup> The average hold

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23       <sup>5</sup> The regulations provide that "these time limits are  
24 directory and do not affect the board's jurisdiction to hold a  
25 revocation hearing in the event of delay which does not prejudice  
26 the parolee." Cal Code Regs. tit. 15, § 2640(a).

25       <sup>6</sup> It is undisputed that approximately ten percent of all  
26 revocation hearings take place in more than forty-five days. See  
Defendants' Statement of Undisputed Facts, at No. 1.

1 to revocation hearing time statewide is 35.2 days.<sup>7</sup>

2 **II.**

3 **SUMMARY JUDGMENT STANDARDS**

4 Summary judgment is appropriate when it is demonstrated  
5 that there exists no genuine issue as to any material fact, and  
6 that the moving party is entitled to judgment as a matter of  
7 law. Fed. R. Civ. P. 56(c); see also Adickes v. S.H. Kress &  
8 Co., 398 U.S. 144, 157 (1970); Owen v. Local No. 169, 971 F.2d  
9 347,355(9th Cir. 1992).

10 Under summary judgment practice, the moving party

11 [A]lways bears the initial responsibility of  
12 informing the district court of the basis for  
13 its motion, and identifying those portions of  
14 "the pleadings, depositions, answers to  
15 interrogatories, and admissions on file,  
16 together with the affidavits, if any," which  
17 it believes demonstrate the absence of a  
18 genuine issue of material fact.

19 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here  
20 the nonmoving party will bear the burden of proof at trial on a  
21 dispositive issue, a summary judgment motion may properly be

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22 <sup>7</sup> As of March 2001, the average hold to revocation hearing  
23 time in the State was 35.2 days. See Plaintiffs' Undisputed Facts,  
24 at No. 23. Specifically, the State's regional averages with  
25 respect to this time lapse are as follows: Region I - 38.8 days,  
26 Region II - 36.2 days, Region III - 37.7 days, and Region IV - 28.8  
27 days. See Plaintiffs' Undisputed Facts, at Nos. 19-22. As of May  
28 2001, sixty-four percent of parolees alleged to have violated a  
29 condition of their parole had a hold to revocation hearing time of  
30 thirty-one to forty-five days. See Plaintiffs' Undisputed Facts,  
31 at No. 28. Specifically, the State's regional percentages of  
32 parolees who had their revocation hearings between thirty-one and  
33 forty-five days are as follows: Region I - 79.6%, Region II -  
34 93.7%, Region III - 92.9%, and Region IV - 33.1%. See Plaintiffs'  
35 Undisputed Facts, at Nos. 24-27.

1 made in reliance solely on the 'pleadings, depositions, answers  
2 to interrogatories, and admissions on file.'" Id. Indeed,  
3 summary judgment should be entered, after adequate time for  
4 discovery and upon motion, against a party who fails to make a  
5 showing sufficient to establish the existence of an element  
6 essential to that party's case, and on which that party will  
7 bear the burden of proof at trial. See id. at 322. "[A]  
8 complete failure of proof concerning an essential element of the  
9 nonmoving party's case necessarily renders all other facts  
10 immaterial." Id. In such a circumstance, summary judgment  
11 should be granted, "so long as whatever is before the district  
12 court demonstrates that the standard for entry of summary  
13 judgment, as set forth in Rule 56(c), is satisfied." Id. at  
14 323.

15       If the moving party meets its initial responsibility, the  
16 burden then shifts to the opposing party to establish that a  
17 genuine issue as to any material fact actually does exist. See  
18 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
19 586 (1986); see also First Nat'l Bank of Ariz. v. Cities Serv.  
20 Co., 391 U.S. 253, 288-89 (1968); Ruffin v. County of Los  
21 Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied, 455  
22 U.S. 951 (1980).

23       In attempting to establish the existence of this factual  
24 dispute, the opposing party may not rely upon the denials of its  
25 pleadings, but is required to tender evidence of specific facts  
26 in the form of affidavits, and/or admissible discovery material,

1 in support of its contention that the dispute exists. Rule  
2 56(e); see also Matsushita, 475 U.S. at 586 n.11; First Nat'l  
3 Bank, 391 U.S. at 289; Strong v. France, 474 F.2d 747, 749 (9th  
4 Cir. 1973). The opposing party must demonstrate that the fact  
5 in contention is material, i.e., a fact that might affect the  
6 outcome of the suit under the governing law, see Anderson 477  
7 U.S. at 248; see also T.W. Elec. Serv., Inc. v. Pacific Elec.  
8 Contractors Ass'n., 809 F.2d 626, 630 (9th Cir. 1987), and that  
9 the dispute is genuine, i.e., the evidence is such that a  
10 reasonable jury could return a verdict for the nonmoving party,  
11 see Anderson 477 U.S. 248-49; see also Wool v. Tandem Computers,  
12 Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

13 In the endeavor to establish the existence of a factual  
14 dispute, the opposing party need not establish a material issue  
15 of fact conclusively in its favor. It is sufficient that "the  
16 claimed factual dispute be shown to require a jury or judge to  
17 resolve the parties' differing versions of the truth at trial."  
18 First Nat'l Bank, 391 U.S. at 290; see also T.W. Elec. Serv.,  
19 809 F.2d at 631. Thus, the "purpose of summary judgment is to  
20 'pierce the pleadings and to assess the proof in order to see  
21 whether there is a genuine need for trial.'" Matsushita, 475  
22 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's  
23 note on 1963 amendments); see also International Union of  
24 Bricklayers & Allied Craftsman Local Union No. 20 v. Martin  
25 Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985).

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1           In resolving the summary judgment motion, the court  
2 examines the pleadings, depositions, answers to interrogatories,  
3 and admissions on file, together with the affidavits, if any.  
4 Rule 56(c); see also SEC v. Seaboard Corp., 677 F.2d 1301, 1305-  
5 06 (9th Cir. 1982). The evidence of the opposing party is to be  
6 believed, see Anderson, 477 U.S. at 255, and all reasonable  
7 inferences that may be drawn from the facts placed before the  
8 court must be drawn in favor of the opposing party. See  
9 Matsushita, 475 U.S. at 587 (citing United States v. Diebold,  
10 Inc., 369 U.S. 654, 655 (1962) (per curiam)); see also Abramson  
11 v. University of Hawaii, 594 F.2d 202, 208 (9th Cir. 1979).  
12 Nevertheless, inferences are not drawn out of the air, and it is  
13 the opposing party's obligation to produce a factual predicate  
14 from which the inference may be drawn. See Richards v. Nielsen  
15 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),  
16 aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

17           Finally, to demonstrate a genuine issue, the opposing party  
18 "must do more than simply show that there is some metaphysical  
19 doubt as to the material facts . . . Where the record taken as a  
20 whole could not lead a rational trier of fact to find for the  
21 nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

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1 III.

2 PROCEDURAL DUE PROCESS

3 A. FRAMEWORK FOR ANALYSIS

4 In Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme  
5 Court established a three step balancing test to resolve  
6 procedural due process claims. While Mathews did not involve  
7 claims arising in a parole context, that fact does not appear  
8 significant. Indeed, procedural due process jurisprudence  
9 appears to employ the same three part test irrespective of the  
10 context in which the claim arises. See Greenholtz v. Inmates,  
11 Nebraska Penal & Correctional Complex, 442 U.S. 1, 18 (1979).<sup>8</sup>

12 Of course to recognize that the same standard applies, is not to  
13 say that context is irrelevant. On the contrary, as explained  
14 below, context is one of the elements to be considered in  
15 arriving at a conclusion as to what process is due. I turn to  
16 the three part test.

17 The first criteria in assessing the process due is the  
18 value of the liberty interest and the degree of potential  
19 deprivation. See Mathews, 424 U.S. at 341. (citing Morrissey,

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21 <sup>8</sup> Morrissey v. Brewer, 408 U.S. 471 (1972), the seminal  
22 parole violation case preceded Mathews. It cited to Mathews'  
23 direct ancestors in reaching its conclusions. See Morrissey, 408  
24 U.S. at 481 (citing Goldberg v. Kelly, 397 U.S. 254, 263 (1970);  
25 Fuentes v. Shevin, 407 U.S. 67 (1972)). Moreover, Mathews, while  
26 involving a property interest in Social Security disability  
benefits, cited to cases in the prison context, as well as  
Morrissey, to develop its test for determining the process due  
before deprivation of a constitutionally protected interest. See  
Mathews, 424 U.S. at 333-34 (citing Wolff v. McDonnell, 418 U.S.  
539, 557-58 (1974); Morrissey, 408 U.S. at 481).

1 408 U.S. 471). As the Court in Morrissey noted, "consideration  
2 of what procedures due process may require under any given set  
3 of circumstances must begin with a determination of the precise  
4 nature of the government function involved as well as of the  
5 private interest that has been affected by the governmental  
6 action." Morrissey, 408 U.S. at 481 (quoting Cafeteria &  
7 Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).  
8 After identifying the nature of the right at issue, the court  
9 must consider "the fairness and reliability of the existing  
10 pretermination procedures, and the probable value, if any, of  
11 additional procedural safeguards." Mathews, 424 U.S. at 343.  
12 Finally, the court must consider the administrative burden and  
13 other societal costs, or benefits, which might be associated  
14 with requiring more process as a matter of constitutional law.  
15 Id. at 347.

16 As Morrissey noted, the liberty interest at stake in cases  
17 such as the one at bar, is a parolee's interest in retaining the  
18 "enduring attachments of normal life" so long as he or she does  
19 not violate the conditions of parole. 408 U.S. at 482.<sup>9</sup> While  
20 there may be no constitutional right to parole and while the  
21 conditions of parole may significantly restrict a parolee's

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22  
23 <sup>9</sup> The Court explained that:

24 "Subject to the conditions of his parole, he [the  
25 parolee] can be gainfully employed and is free to be  
26 with family and friends and to form the other enduring  
attachments of normal life . . ."

26 Morrissey, 408 U.S. at 480.

1 freedom, it is self-evident that the liberty interest of a  
2 parolee is quite significant, and much greater than the liberty  
3 interest of a prisoner still confined within the prison system.  
4 See id.<sup>10</sup> ("Though the State properly subjects [a parolee] to  
5 many restrictions not applicable to other citizens, his  
6 condition is very different from that of confinement in  
7 prison.").<sup>11</sup>

8 Under the rationale of Morrissey, the "fairness and  
9 reliability" of the existing procedures should then be measured  
10 by determining how effective the procedures are in assuring a  
11 factually accurate statement of (1) whether there is probable  
12 cause to believe that the parolee violated parole (procedures  
13 during preliminary stage), and (2) whether the parolee did in  
14 fact violate parole (procedures during revocation hearing). As  
15 the High Court explained, "[i]n analyzing what [process] is due,  
16 we see two important stages in the typical process of parole  
17 revocation . . . The first stage occurs when the parolee is  
18 arrested and detained, usually at the direction of the parole  
19 officer. The second occurs when parole is formally revoked."  
20 408 U.S. at 485. The first stage is to insure that the

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21  
22 <sup>10</sup> Just ask any defendant in a criminal trial whether he  
wants probation or imprisonment.

23 <sup>11</sup> Since the liberty interest of those persons outside the  
24 prison is far greater than those who are imprisoned, cases such as  
25 Sandin v. Conner, 515 U.S. 472 (1995), and Meachum v. Fano, 427  
26 U.S. 215 (1976), which involve asserted rights within prison, do  
not inform what weight is to be accorded the liberty interest at  
stake in the parole context. See also Young v. Harper, 520 U.S.  
143, 147-48 (1997).

1 parolee's life is not disrupted by an unjustified parol hold,  
2 while the second stage requires reliable information justifying  
3 the parolee's long term reincarceration. Id. Fundamentally, the  
4 process due must include procedures which will prevent parole  
5 from being revoked because of "erroneous information or because  
6 of an erroneous evaluation." Id. at 484.

7 Of course, as with all due process considerations, the  
8 balance which the court strikes in the parole revocation context  
9 is informed by an understanding that "due process is flexible  
10 and calls for such procedural protections as the particular  
11 situation demands." Id. at 481. Put bluntly, however,  
12 flexibility is not a shibboleth permitting something less than  
13 what the particular situation does demand.

14 Given all the above, I now consider the process that is due  
15 when a parolee's liberty interest is endangered by a claimed  
16 violation of the terms of parole.<sup>12</sup>

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18 <sup>12</sup> Defendants appear to suggest that the Prison Litigation  
19 Reform Act ("PLRA"), 18 U.S.C. § 3626(a)(1)(A), has altered the  
20 values to be balanced requiring the court to afford "substantial  
21 weight" to any adverse impact upon public safety or the operation  
22 of the criminal justice system. I cannot agree.

21 By its terms, Section 3626(a)(1)(A) applies to any "civil  
22 action with respect to prison conditions." Here, plaintiffs do not  
23 challenge prison conditions. Rather, plaintiffs challenge quite  
24 a different subject, parole violation procedures. As noted supra,  
25 the Supreme Court has long recognized different issues are at stake  
26 when addressing parolees as contrasted with those who are  
imprisoned. Young v. Harper, 520 U.S. 143 (1997). While  
considerations of public safety and the impact on the criminal  
justice system are proper factors to weigh in determining the  
process due, the weight to be accorded those factors is unaffected  
by PLRA.

1 Plaintiffs assert that California's unitary parole  
2 revocation hearing system does not comport with the requirement  
3 of the federal constitution's Due Process Clause. In this  
4 motion, they contend that the State's failure to conduct  
5 preliminary hearings at the time of a parolee's arrest and  
6 detention is unconstitutional.

7 To assess the validity of plaintiffs' claim, the court must  
8 first determine whether there is controlling precedent speaking  
9 to the particular procedures due at the initial stage of the  
10 parole revocation process. Obviously where binding precedent  
11 requires particular procedures, the pertinent question is  
12 whether defendants are providing those required procedures. In  
13 the absence of such controlling precedent, the task is to apply  
14 the Mathews process to the procedures at issue. As I now  
15 observe, the courts by which I am bound have spoken with less  
16 than perfect clarity on the issues before me.

17 **B. PRE-REVOCAATION HEARINGS**

18 Plaintiffs assert that they are being denied due process  
19 because defendants do not afford parolees preliminary hearings  
20 to verify the existence of probable cause prior to the  
21 revocation hearing. Defendants acknowledge that under  
22 California's regulations and the current practice, the Board  
23 conducts pre-revocation hearings only when the parolee is  
24 suspected of a serious parole violation within thirty days of  
25 the parolee's maximum discharge date. See Cal. Code Regs. tit.  
26 15, § 2644(a). Otherwise, parolees suspected of parole

1 violations are only afforded a unitary parole revocation  
2 hearing, often held within forty-five days of the date the  
3 parole hold is placed. Defendants contend, however, that a  
4 preliminary hearing is not required, and that the State's  
5 unitary parole revocation procedure provides a constitutionally  
6 equivalent process. Below, I explain why defendants' arguments  
7 are less than persuasive.

8 In Morrissey, the Supreme Court appeared to determine that  
9 the Constitution requires a two stage process. 408 U.S. at 485  
10 ("[W]e see two important stages in the typical process of parole  
11 revocation," the first being the "arrest and preliminary  
12 hearing" stage, and the second, "when parole is formally  
13 revoked."). The Court explained that the initial "inquiry  
14 should be seen as in the nature of a 'preliminary hearing' to  
15 determine whether there is probable cause or reasonable ground  
16 to believe that the arrested parolee has committed acts that  
17 would constitute a violation of parole conditions." Id.

18 The Morrissey Court's explanation of the requirements for a  
19 preliminary procedure plainly suggests that it contemplated a  
20 "hearing" rather than some ex-parte process, for confirming  
21 probable cause. For instance, in describing the "preliminary  
22 hearing," the Court stated that "the parolee should be given  
23 notice that the hearing will take place and that its purpose is  
24 to determine whether there is probable cause to believe he has  
25 committed a parole violation." Id. at 486-87. The Court added  
26 that "[a]t the hearing, the parolee may appear and speak in his

1 own behalf; he may bring letters, documents, or individuals who  
2 can give relevant information to the hearing officer." Id. at  
3 487. Moreover, on request of the parolee, the "person who has  
4 given adverse information on which parole revocation is to be  
5 based is to be made available for questioning in his presence."  
6 Id. Finally, the Court required that the determination of  
7 reasonable grounds "should be made by someone not directly  
8 involved in the case." Id. at 485.

9 Despite the fairly detailed description of a  
10 constitutionally sufficient preliminary determination, it  
11 remains true that the Court has repeatedly taught, and not just  
12 in Morrissey, that the requisites of due process are flexible.  
13 As will be seen, this teaching has suggested to some that  
14 Morrissey did not command two hearings under all circumstances.  
15 As I now explain, that conclusion, while plausible, is difficult  
16 to maintain in light of the Supreme Court's next discussion of  
17 the issue.

18 A year after Morrissey, the Court explained that in that  
19 case "we held that a parolee is entitled to two hearings, one a  
20 preliminary hearing at the time of his arrest and detention to  
21 determine whether there is probable cause to believe that he has  
22 committed a violation of his parole, and the other a somewhat  
23 more comprehensive hearing prior to the making of the final  
24 revocation decision." Gagnon v. Scarpelli, 411 U.S. 778, 781-82  
25 (1973); see also id. at 786 ("Morrissey mandated preliminary and  
26 final revocation hearings."). The Gagnon Court again emphasized

1 that "[a]t the preliminary hearing, a probationer or parolee is  
2 entitled to notice of the alleged violations . . . an  
3 opportunity to appear and to present evidence on his own behalf,  
4 a conditional right to confront adverse witnesses, an  
5 independent decisionmaker, and a written report of the hearing."  
6 411 U.S. at 786. Observing no difference between parole  
7 revocation and probation revocation, the Court stated that "we  
8 hold that a probationer, like a parolee, is entitled to a  
9 preliminary and final revocation hearing." Id. at 782.

10 While it would appear that, without more, Morrissey and  
11 Gagnon are dispositive, this court is also bound by the Ninth  
12 Circuit's interpretation of the teachings of the High Court. I  
13 thus turn to the Circuit's cases.

14 Nine years after Gagnon, the question of hearings under  
15 Morrissey was discussed in Pierre v. Wash. St. Bd. of Prison  
16 Terms & Paroles, 699 F.2d 471 (9th Cir. 1983). There, a habeas  
17 petitioner, after having his parole revoked, claimed that the  
18 State did not adhere to its own guidelines for determining his  
19 minimum prison term. The petitioner also claimed that he was  
20 denied due process because the State did not provide him with a  
21 preliminary hearing prior to his revocation hearing. On appeal,  
22 the petitioner abandoned his claim regarding the preliminary  
23 hearing. Nonetheless, after rejecting his claim concerning  
24 State guidelines, the Circuit panel stated that "[a]lthough  
25 appellant abandoned his contention that failure to hold a  
26 preliminary hearing prior to the formal on-site revocation

1 hearing violated his due process right, we believe the issue is  
2 before us." Pierre, 699 F.2d at 472.<sup>13</sup> The Pierre court then  
3 opined that the Supreme Court did not intend to require two  
4 hearings in every case, but only in cases with a fact pattern  
5 similar to the one before it in Morrissey. See Pierre, 699 F.2d  
6 at 472-73.<sup>14</sup> Emphasizing the language in Morrissey abjuring  
7 formalism in the revocation process, Pierre then declared that  
8 "[u]nder the facts of Morrissey, the two-hearing system  
9 requirement was just one way to satisfy minimum due process; it  
10 is not the only way in every case." Id. The Circuit panel  
11 failed to discuss Gagnon's explanation that in Morrissey the  
12 Court had held that, indeed, two hearings were required.

13 At least one way of reading Pierre so as to be consistent  
14 with Morrissey, is to read it as not departing from an  
15 obligation to provide a preliminary hearing, but rather, as  
16 concluding no more than that a final revocation hearing  
17 occurring within twenty-one days of the arrest of a parolee was  
18 "prompt enough to qualify as the preliminary probable cause  
19

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20 <sup>13</sup> Given that anyone may waive a constitutional claim, the  
21 Pierre court's assertion is indeed puzzling.

22 <sup>14</sup> In Morrissey, the Court explained the importance of a  
23 prompt preliminary hearing noting that because "there is typically  
24 a substantial time lag" between arrest and the final revocation  
25 determination, and since "it may be that the parolee is arrested  
26 at a place distant" from the place where the final revocation  
hearing will take place, "due process would seem to require that  
some minimal inquiry be conducted at or reasonably near the place  
of the alleged parole violation or arrest and as promptly as  
convenient after arrest while information is fresh and sources are  
available." 408 U.S. at 485.

1 determination required by Morrissey." Pierre, 699 F.2d at 473.  
2 This reading of Pierre is supported by subsequent Ninth Circuit  
3 cases. In United States v. Stocks, 104 F.3d 308 (9th Cir.  
4 1997), a panel stated that "[a]fter Morrissey, parole may not be  
5 revoked unless the parolee is afforded a hearing as to probable  
6 cause and a final revocation hearing. At the preliminary parole  
7 revocation hearing, a parolee is entitled to notice of the  
8 alleged parole violations, an opportunity to appear and to  
9 present evidence, a conditional right to confront the  
10 government's witnesses, an independent decision-maker, and a  
11 written report of the hearing." Id. at 311; see also White v.  
12 White, 925 F.2d 287 (9th Cir. 1991) (finding that Morrissey  
13 contemplated both a preliminary and a final revocation  
14 hearing).<sup>15</sup>

15        Whatever else may be said for Pierre, it seems apparent it  
16 is dicta. Moreover, although this court should pay respectful  
17 attention to Circuit dicta, given all the above it would seem  
18 the defendants can only rely on Pierre if their practice of  
19 delaying the revocation hearing roughly between thirty-one and  
20 forty-five days meets Morrissey's requirement that there be a  
21 prompt determination of probable cause. California's time frame

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23        <sup>15</sup> In White the Ninth Circuit held that the Parole  
24 Commission's refusal to allow plaintiff to confront and  
25 cross-examine adverse witnesses at his parole revocation hearing  
26 violated his right to due process. 925 F.2d at 290. While the  
case addressed the final revocation hearing, the White court  
examined Morrissey in detail and concluded that "[t]o gather the  
facts necessary to make the two-part decision, the Morrissey court  
contemplated two hearings." Id. at 291.

1 for holding a hearing far exceeds the twenty-one days the Pierre  
2 panel thought sufficed.<sup>16</sup>

3 Defendants provide no authority to support the proposition  
4 that an average delay of thirty-one to forty-five days is  
5 acceptable under Morrissey and Gagnon.<sup>17</sup> While some state courts  
6 have held that a preliminary hearing can occur within thirty  
7 days from the date of arrest, see State v. Myers, 86 Wash.2d 419  
8 (1976) (en banc), it does not appear that any court has indicated  
9 that a delay of more than thirty days would be justifiable.<sup>18</sup>  
10 Indeed, even in Ellis v. District of Columbia, 84 F.3d 1413  
11 (D.C. Cir. 1996), the D.C. Circuit case on which defendants  
12 rely, the policy required the final revocation hearing to occur

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13  
14 <sup>16</sup> Defendants' process may have other problems. As noted, it  
15 encourages Alford type admissions of violation. See n. 4 supra.  
16 Putting the parolee to such a choice without at least a  
17 determination of probable cause may itself raise due process  
18 questions. Because the court resolves the instant motion on other,  
19 more established grounds, I need not consider that issue further.  
20 As I point out in the text, however, the effect of the screening  
21 offer in assuring reliable fact-finding bears on the Mathews  
22 balancing test.

23 <sup>17</sup> While Pierre opined that twenty-one days was not  
24 inappropriate, the Seventh Circuit has suggested in dicta that a  
25 ten day delay may violate Morrissey. See Luther v. Molina, 627  
26 F.2d 71, 75, n.3 (7th Cir. 1980)("Chief Justice Berger [in  
Morrissey] seemed to be contemplating an almost immediate hearing  
. . . . It is possible that a ten day delay between detention and  
the preliminary hearing does not meet . . . constitutional . . .  
requirements.").

23 <sup>18</sup> It may be of some interest that the United States Senate  
24 has noted relative to preliminary hearings in the federal parole  
25 system, that a two-day detainment could result in a loss of  
26 employment and severe disruption of the reintegration effort. See  
S. Rep. No. 369, 94th Cong., 1st Sess. 25-26 (1975), reprinted in  
1976 U.S.C.C.A.N. 335, 347, cited in Ellis v. District of Columbia,  
84 F.3d 1413, 1430 (D.C. Cir. 1996).

1 within thirty days from the date the Board was notified of the  
2 execution of a warrant, and regulations mandated a preliminary  
3 interview prior to the revocation hearing. Id. at 1240.<sup>19</sup>

4 Given all the above, this court concludes that even if a  
5 prompt unitary hearing would meet constitutional muster, a  
6 question I need not resolve, California's system allowing a  
7 delay of up to forty-five days or more before providing the  
8 parolee an opportunity to be heard regarding the reliability of  
9 the probable cause determination does not.

10 Again, even assuming that Morrissey and Gagnon do not  
11 compel a prompt preliminary hearing, the court's conclusion  
12 above is necessitated by application of the Mathews test. In  
13 order to protect a parolee's liberty interest, Morrissey  
14 requires procedures to insure not only that the State does not  
15 revoke parole without an adequate factual basis, but that

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16  
17 <sup>19</sup> The majority in Ellis, like Pierre, emphasized the  
18 flexible nature of due process and distinguished the facts in the  
19 District of Columbia from those in Morrissey. As the dissent  
20 pointed out, however, that reasoning fails to come to grips with  
21 Gagnon's explanation that two hearings are required by Morrissey.  
22 See Ellis, 84 F.3d at 1429-30 (J. Tatel, dissenting). While the  
23 majority relied on the footnote in Gagnon encouraging the States  
24 to devise "creative solutions" to cope with the practical  
25 difficulties of complying with Morrissey, Ellis, 84 F.3d at 1422  
26 (citing Gagnon, 411 U.S. at 782, n.5), that cannot reasonably be  
construed as an invitation to avoid the fundamental requirements  
of Morrissey. Whatever "creative solutions" or flexibility the Due  
Process Clause permits, it would appear that the Supreme Court has  
so far done nothing to indicate a retreat from its previous  
position. Finally, for what it is worth, California's situation  
far more clearly resembles that found in Morrissey rather than the  
situation in the District of Columbia. In sum, then, with all due  
respect, I do not find Ellis helpful in resolving the issue before  
this court.

1 parolees are not detained without some sort of assurance that  
2 there is probable cause to suspect a parole violation. The  
3 effect of detention itself, in its disruption of the parolee's  
4 family relationship, job, and life, is sufficiently significant  
5 to require such a procedure.

6       Moreover, it is clear that the screening offer procedure  
7 places a severe strain on an accurate fact-finding process.  
8 While, clearly, Alford pleas do not offend the Constitution, and  
9 indeed frequently benefit the parolee, that is not the issue in  
10 terms of the three part balancing test. In that context, the  
11 issue is whether greater process produces a more reliable  
12 result. Certainly when a probable cause determination has been  
13 made, society can have greater confidence that the screening  
14 offer has not produced an unreliable result.

15       Finally, of course, the court must balance the social  
16 interest in protecting an individual's interest in remaining at  
17 large with the State's interest in protecting the public from  
18 parolees who have violated the conditions of their parole. In  
19 seeking to weigh that interest, however, the court is  
20 handicapped, since the defendants offer no evidence for the  
21 proposition that a delay of thirty-one to forty-five days is  
22 necessary to insure protection of that interest. Moreover,  
23 while administrative inconvenience is a proper Mathews  
24 consideration, the inconvenience occasioned by a prompt probable  
25 cause hearing would not appear to be, in and of itself, a  
26 sufficient justification for the potentially catastrophic

1 consequences of delay. Indeed, the Supreme Court seems to view  
2 with equanimity the inconvenience that Morrissey engendered.  
3 See Gagnon, 411 U.S. at 782, n.5 (“[s]ome amount of disruption  
4 inevitably attends any new constitutional ruling.”).

5 For all the above reasons, the court concludes that whether  
6 viewed as compelled by Morrissey, or the result of a Mathews  
7 balancing test, the current California parole revocation system  
8 violates the plaintiffs’ due process rights.

9 **IV.**

10 **ORDERS**

11 Accordingly, plaintiffs’ motion for partial summary  
12 judgment is GRANTED.

13 IT IS SO ORDERED.

14 DATED: June 14, 2002.

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LAWRENCE K. KARLTON  
17 SENIOR JUDGE  
18 UNITED STATES DISTRICT COURT  
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