PAROLE REVOCATION PROCEEDINGS: FAQs[1]

1. What is the effective date of the new parole revocation procedures?

July 1, 2013. Courts will assume responsibility for the adjudication of all parole violations, regardless of when the parolees committed the alleged violation, the date of the underlying crime, the nature of the underlying crime, or when they were sentenced to state prison. (Pen. Code, § 3000.08(a).)[2] But see Question 5, which addresses revocation proceedings pending on July 1, 2013.

2. What is the role of the courts and the Department of Corrections and Rehabilitation (CDCR), Division of Adult Parole Operations (DAPO), with respect to persons on parole after July 1, 2013?

Parolees will "be subject to parole supervision by [CDCR] and the jurisdiction of the court in the county where the parolee is released or resides for the purpose of hearing petitions to revoke parole and impose a term of custody. . . ." (§ 3000.08(a).) DAPO will continue to be responsible for supervision of persons placed on parole after July 1, 2013. Revocation proceedings, however, will no longer be administrative proceedings conducted by the Board of Parole Hearings (BPH). Instead, parole revocation proceedings will be adversarial judicial proceedings conducted in the superior courts under section 1203.2.

3. Who is covered by the new procedures?

Parolees released from state prison after serving a term or whose prison sentence was deemed served under section 2900.5 for the following crimes will be under the jurisdiction of the courts for purposes of adjudicating parole violations: (§ 3000.08(a).)

- Serious or violent felonies described in sections 1192.7(c) and 667.5(c).
- Crimes sentenced under sections 667(e)(2) or 1170.12(c)(2) – defendants sentenced as third strike offenders under the Three Strikes law.

[1] The answers to FAQs were jointly prepared by J. Richard Couzens, Judge of the Superior Court of Placer County (Ret.); Morris D. Jacobson, Judge of the Superior Court of Alameda County; Phillip H. Pennypacker, Judge of the Superior Court of Santa Clara County; Dylan M. Sullivan, Commissioner of the Superior Court of El Dorado County; Arturo Castro, senior attorney, Criminal Justice Court Services Office, Administrative Office of the Courts; and Rodger W. Meier, Chief, In-Prison Programs, Office of Offender Services, California Department of Corrections and Rehabilitation. These materials are for informational purposes only and the responses are not to be construed as legal opinion or advice.

[2] Unless otherwise indicated, all references are to the Penal Code.

- Any crime where the inmate is classified as a "High Risk Sex Offender." (§ 3000.08(a)(4).) Although not specifically referenced in section 3000.08(a)(4), section 13885.4 defines “high risk sex offenders” as “those persons who are required to register as sex offenders pursuant to the Sex Offender Registration Act and who have been assessed with a score indicating a ‘high risk’ on the SARATSO identified for that person's specific population as set forth in Section 290.04, or who are identified as being at a high risk of reoffending by the Department of Justice, based on the person's SARATSO score when considered in combination with other, empirically based risk factors.”

- Any crime where the parolee is required as a condition of parole to undergo treatment with the Department of Mental Health.

All other inmates are to be released to Postrelease Community Supervision (PRCS). (§ 3000.08(b).)

4. What is the length of parole supervision?

For most parolees, the parole period will be three years. (§ 3000(b).) Some parolees with life terms will be subject to a parole period of five or ten years. (§§ 3000(b)(1) and (b)(3).) The following parolees, however, will remain on parole for three years, or the prescribed term, whichever is greater: (§ 3000.08(i).)

- A person required to register as a sex offender who was subject to a period of parole longer than three years at the time the underlying offense was committed. (§ 3000(b)(4)(A).)

- A person subject to parole for life under section 3000.1 at the time the underlying offense was committed.

Courts will be required to adjudicate parole violations for the entire period of parole, regardless of length.

5. Who adjudicates revocation proceedings that are pending on July 1, 2013?

The BPH will adjudicate revocation proceedings for (1) parolees who have a pending adjudication for a parole violation as of July 1, 2013, and (2) parolees who have an earlier parole proceeding that is reopened after July 1, 2013. (§ 3000.08(j).)

6. Who actually supervises parolees?

DAPO provides physical supervision of persons on parole. In contrast, county probation officers will continue to supervise persons on PRCS.

7. If there is a suspected parole violation, who has the authority to arrest the parolee?

A parole agent or peace officer. If, during the parole period, a parole agent or peace officer has probable cause to believe the parolee violated a condition of parole, the parolee is subject to arrest without a warrant or other process. Specifically, "at any time until the final disposition of the case, [the parole agent or peace officer may] arrest the person and bring him or her before the court, or the court may, in its discretion, issue a warrant for that person's arrest pursuant to Section 1203.2." (§ 3000.08(c).)
Furthermore, section 1203.2(a) authorizes courts to issue a warrant based on a parole violation. Section 1203.2(f) defines "court" to include a judge, magistrate, or revocation hearing officer as described in Government Code section 71622.5.
Normally DAPO will request an arrest warrant only when the parolee has absconded or committed a new serious crime.

8. Will courts be required to issue warrants for parole violations after normal court hours?

Likely, yes. While parole agents should endeavor to process requests for warrants during normal business hours, in the unusual circumstance where there is after-hours urgency, courts likely will be obligated to process warrants in accordance with the on-call magistrate procedure provided in section 810. The courts, however, have flexibility in determining who may issue the warrants. The duty may be assigned to a sitting or assigned judge, magistrate, or revocation hearing officer as described in Government Code section 71622.5. (§§ 1203.2(a) and (f).)

9. Will parole holds be used after July 1, 2013?

Yes. Parole holds may be placed by the supervising parole agent pending resolution of an alleged parole violation pursuant to section 3056. Although there is no language in section 3056 expressly allowing parole holds, the section provides that "[a] parolee awaiting a parole revocation hearing may be housed in a county jail awaiting revocation proceedings." CDCR and local jails have interpreted this provision as authorizing parole holds. Holds placed under these circumstances will not involve the courts. The authority to place a hold is in addition to the power of DAPO to arrest, discussed in Question 7, *supra*.

The parole hold will be lifted when parole imposes intermediate sanctions or upon the release of a person after completion of any custody time ordered after revocation of parole. Courts will have the ability to override the parole hold by setting bail or releasing the parolee on his or her own recognizance, once the matter is before a court on a petition to revoke parole.

10. Who determines the custody status of parolees pending resolution of a parole violation?

If the matter is being handled informally by DAPO under section 3000.08(d), DAPO will determine the parolee's custody status through use of the parole hold under section 3056. If the matter comes to court on a petition to revoke parole, courts will have paramount authority to determine custody status at and after arraignment on the petition.

11. Are parolees entitled to bail?

No. Parolees have no right to bail on a pending violation. (*In re Law* (1973) 10 Cal.3d 21, 26.) However, once a court has jurisdiction over a petition to revoke parole, the court may set bail or release the parolee on his or her own recognizance, if deemed appropriate.

12. Who has the authority to issue arrest warrants on parole violations on and after July 1, 2013?

The courts. On and after July 1, 2013, the sole authority to issue warrants for the return to actual custody of any parolee released on parole rests with the courts pursuant to section 1203.2. The only exception is for an escaped parolee or a parolee released prior to his or her scheduled release date who should be returned to custody. (§ 3000(b)(9)(A).) However, any warrant issued by the BPH before July 1, 2013 must remain in full force and effect until the warrant is served or it is recalled by the BPH. All parolees arrested on a warrant issued by the BPH will be subject to review by the BPH before the filing of a petition with the courts to revoke parole. (§ 3000(b)(9)(B).)

Arrest warrants may be issued by a sitting or assigned judge, magistrate, or revocation hearing officer as described in Government Code, section 71622.5. (§§ 1203.2(a) and (f).)

13. Should the courts summarily revoke parole when they issue a warrant?

Probably. Because parole revocation proceedings are governed by section 1203.2, most likely the courts should summarily revoke parole in the same manner as summarily revoking probation or other forms of supervision. Summary revocation will have the effect of suspending the remaining supervision period. (§ 1203.2(a).)

14. When a parole agent seeks an arrest warrant for a parole violation, must the request be supported by a petition and/or report?

No, but the request should include sufficient facts to support a finding of probable cause for issuance of the warrant. Section 3000.08(d), governing intermediate sanctions for parole violations, does not require the parole agent to file a petition or report in

connection with a request for an arrest warrant. Indeed, section 3000.08(c) expressly allows the arrest of a parolee with or without a warrant. While no petition is required for the issuance of a warrant, the warrant process itself presumes a judicial officer will make at least a preliminary determination that there is probable cause for arrest. (§ 813(a).) Accordingly, the request for an arrest warrant should be accompanied by at least a minimal declaration of the nature of the violation. The Judicial Council's Criminal Law Advisory Committee directed AOC staff to develop a warrant request form for these purposes. If and when approved by the Judicial Council, the form will be made available for use by DAPO and the courts.

If DAPO seeks an arrest warrant in connection with a violation that will be handled informally, the courts may be asked later to recall the warrant. The request should be handled administratively, without the need for a court hearing.

15. Must there be a probable cause hearing held at or near the time the parolee is taken into custody on a parole violation? If so, who makes the determination?

No. The right to a probable cause hearing is discussed in the seminal case of *Morrissey v. Brewer* (1972) 408 U.S. 471. There, the U.S. Supreme Court ruled the parolee is entitled to a preliminary review by an independent officer, at or near the time and place of the parolee's arrest, to determine if "reasonable ground exists for revocation of parole. . . ." (*Id.* at p. 485.) The court did not require the determination be made by a judicial officer. (*Id*. at p. 486.) At the probable cause hearing, the parolee must be given notice of the charges and an opportunity to speak or present evidence on his or her own behalf and cross-examine any accusers. (*Id*. at pp. 486-487.) The manner in which these due process requirements are implemented, however, was left to the discretion of each state. (*Id.* at pp. 488-489.)

Although *Morrissey* addressed the parole revocation process, the California Supreme Court initially applied *Morrissey's* due process requirements, including probable cause determinations, to our state's *probation* revocation process. (*People v. Vickers* (1972) 8 Cal.3d 451.) Shortly thereafter, our Supreme Court ruled that because of the due process usually afforded by California's judicial procedure, courts need not conduct formal probable cause hearings for probation violations. (*People v. Coleman* (1975) 13 Cal.3d 867, 894-895.) "Since 'the precise nature of the proceedings for [probation] revocation need not be identical' to the bifurcated *Morrissey* parole revocation procedures, so long as 'equivalent due process safeguards' assure that a probationer is not arbitrarily deprived of his conditional liberty for any significant period of time (*People v. Vickers*, *supra*, 8 Cal.3d at p. 458), a unitary hearing will usually suffice in probation revocation cases to serve the purposes of the separate preliminary and formal revocation hearings outlined in *Morrissey*." (*Coleman*, at pp. 894-895; footnote omitted.)

Following realignment, the Legislature amended sections 1203.2 and 3000.08 to apply probation revocation procedures to parole revocations. The legislation was intended to promote uniform parole revocation procedures and "simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under *Morrissey v. Brewer* (1972) 408 U.S. 471, and *People v. Vickers* (1972) 8 Cal.3d 451, and their progeny." (2011 Realignment Legislation, SB 1023, Sec. 2(b), effective June 27, 2012.) Because courts need not conduct formal probable cause hearings for probation revocations, they need not conduct them for parole revocations.

It is important to observe the distinction between a probable cause "determination," and a probable cause "hearing." Probable cause "determinations" are made at a number of stages in the revocation process. Before taking action against a parolee, DAPO's internal procedures require a probable cause determination be made by a parole agent's supervisor. Intermediate sanctions may be imposed by DAPO "[u]pon review of the alleged violation and a finding of good cause that the parolee has committed a violation of law or violated his or her conditions of parole. . . ." (§ 3000.08(d).) To the extent courts issue arrest warrants, a probable cause determination is made similar to the requirements of section 813(a). Finally, although a probable cause determination is not expressly required by section 1203.2, prudent courts may wish to make such a finding at the time of the parolee's arraignment on the violation, particularly when the arrest was not by warrant. The finding may be based on a petition to revoke parole or its supporting report.

A number of the procedural rights enunciated in *Morrissey* formed the basis of a federal class action lawsuit brought against the state on behalf of parolees, including the right to a probable cause determination and hearing. (*Valdivia, et al. v. Schwarzenegger*., No CIV S-94-0671 (*Valdivia*); (stipulated order for permanent injunctive relief issued in 2003.) For reasons discussed below, *Valdivia* does not apply to the courts. (See discussion of *Valdivia*, *infra*.)

16. Must DAPO attempt to informally resolve parole violations before filing a formal petition in the courts?

Generally, yes. After finding good cause that the parolee has violated a condition of parole, DAPO may add additional conditions of parole, including treatment and rehabilitation services, incentives, and "immediate, structured, and intermediate sanctions. . . ." (§ 3000.08(d).) Furthermore, section 3000.08(f) requires DAPO to determine that intermediate sanctions are not appropriate before filing a formal petition to revoke parole. Sometimes, as where a new felony offense has been charged or where the parolee has absconded, DAPO may make such a determination without exhausting intermediate sanctions.

17. What is "flash incarceration?"

"Flash incarceration" is authorized by section 3000.08(d) as an intermediate sanction. Section 3000.08(e) defines it as

> a period of detention in county jail due to a violation of a parolee's conditions of parole. The length of the detention period can range between one and 10 consecutive days. Shorter, but if necessary more frequent, periods of detention for violations of a parolee's conditions of parole shall appropriately punish a parolee while preventing the disruption in a work or home establishment that typically arises from longer periods of detention.

The inmate is not given "conduct" credits under section 4019. DAPO is authorized to impose "flash incarceration" without court involvement.

Note: Despite the statutory authority described above, on May 28, 2013, DAPO submitted a declaration in federal district court in the Valdivia lawsuit (*Valdivia v. Brown*, CIV S-94-671) stating: "Despite DAPO's authority to impose terms of flash incarceration upon parolees under its supervision on or after July 1, 2013, DAPO will not utilize flash incarceration pursuant to Penal Code sections 3000.08 and 1203.2(g)."

We will provide updated information on DAPO's position regarding use of "flash incarceration" as it becomes available.

18. When do courts become involved with a parole violation?

With the filing of a petition to revoke parole. If DAPO determines that intermediate sanctions are "not appropriate," the agency may file a petition with the courts pursuant to section 1203.2 for revocation of parole. It is filed in the superior court where the parolee is being supervised. (§ 3000.08(f).)

19. Must the petition contain specified information? Is there a Judicial Council form?

Yes. "The petition shall include a written report that contains additional information regarding the petition, including the relevant terms and conditions of parole, the circumstances of the alleged underlying violation, the history and background of the parolee, and any 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." (§ 3000.08(f).) In response to this legislative mandate, the Judicial Council has modified form CR-300 to include parole revocation proceedings.

California Rules of Court, Rule 4.541, which governs the contents of the report submitted in connection with a petition to revoke *probation*, mandatory supervision,

and PRCS has not yet been amended to include petitions to revoke parole; it is anticipated the matter will be addressed by the Judicial Council before July 1, 2013.

20. What procedure will the courts use to adjudicate alleged parole violations?

The procedure specified in section 1203.2. In July 2012 the Governor signed into law budget trailer bills that included various statutory amendments designed to promote uniform revocation procedures for probation, mandatory supervision, postrelease community supervision, and parole. The legislation also was designed to "simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under *Morrissey v. Brewer* (1972) 408 U.S. 471, and *People v. Vickers* (1972) 8 Cal.3d 451, and their progeny." (2011 Realignment Legislation, SB 1023, Sec. 2(b), effective June 27, 2012.) As a result, courts must apply longstanding probation revocation procedures under section 1203.2 to parole revocations.

21. When must a detained parolee be arraigned?

It is not clear. There is no statute specifically setting the time for arraignment on petitions filed under section 1203.2. Section 825(c) is applicable only to arraignments on new crimes. Nevertheless, it may be prudent for courts to adopt an expeditious procedure for arraignment of these individuals.

22. Are parolees entitled to appointed counsel for a violation court hearing?

Yes. Because the violation proceedings are being conducted in accordance with section 1203.2, parolees will be entitled to counsel, including, if necessary, appointed counsel. (See *People v. Vickers* (1972) 8 Cal.3d 451, 461.) See also section 3000.08(f), which references parolees' option of waiving the right to counsel.

23. If courts determine that a parole revocation petition is facially deficient, such as DAPO's failure to show sufficient use of intermediate sanctions, may courts summarily reject petitions?

No. Other than the process of demurrer, there is no procedure in the criminal code that permits courts to summarily "reject" a pleading, including a petition to revoke parole, based on a factual determination that there has been non-compliance with the code. The proper procedure would be to hear the petition on its merits, including any evidence or explanation offered by the supervising parole officer. If a court then concludes DAPO did not appropriately use intermediate sanctions, the proper course is to find the petition "not true" and reinstate parole.

24. Who may conduct the revocation hearings?

The courts, through a judge, magistrate, or qualified revocation hearing officer. Section 3000.08 states that the "court" must conduct revocation proceedings pursuant to section 1203.2. Section 1203.2(f) clarifies that "court" means a "judge, magistrate, or revocation hearing officer described in Section 71622.5 of the Government Code." To be eligible to serve as a hearing officer under Government Code section 71622.5, the person must meet one of the following criteria: (a) he or she has been an active member of the State Bar of California for at least 10 years continuously prior to appointment, (b) he or she is or was a judge of a court of record of California within the last five years, or is currently eligible for the assigned judge program, or (c) he or she is or was a commissioner, magistrate, referee, or hearing officer authorized to perform the duties of a subordinate judicial officer of a court of record of California within the last five years. Each court may prescribe additional minimum qualifications and mandatory training for revocation hearing officers. The superior courts of two or more counties may appoint the same person as a revocation hearing officer.

"[T]he superior court of any county may appoint as many hearing officers as deemed necessary to conduct parole revocation hearings pursuant to Sections 3000.08 and 3000.09 of the Penal Code and to determine violations of conditions of postrelease supervision pursuant to Section 3455 of the Penal Code, and to perform related duties as authorized by the court. A hearing officer appointed pursuant to this section has the authority to conduct these hearings and to make determinations at those hearings pursuant to applicable law." (Gov. Code, § 71622.5(b).) The stipulation of the parties specified by Code of Civil Procedure section 259(d) is not required before a subordinate hearing officer may conduct a revocation-related hearing.

25. Is there any specific time limit within which the hearing on the parole violation must be held?

There is no definitive answer to this question. If the violation cannot be resolved informally, the matter should be set for a contested evidentiary hearing. It is not clear when the hearing must be held if time is not waived. According to the law applicable to the adjudication of probation violations under section 1203.2, the hearing must be held within a "reasonable time." (*In re Mehdizadeh* (2003) 105 Cal.App.4th 995, 999-1000.) The boundaries of a "reasonable time" are not well defined. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 488 [a delay of two months is not unreasonable]; *People v. Buford* (1974) 42 Cal.App.3d 975 [21-day delay is not unreasonable]; *In re Williams* (1974) 36 Cal.App.3d 649 [a delay of two months and 25 days is not unreasonable]; *People v. Young* (1991) 228 Cal.App.3d 171, 180-181 [a 79-day delay is unreasonable].) In setting the hearing, the court is to balance all relevant factors, including whether there is a new crime and the custody status of the defendant. (*In re La Croix* (1974) 12 Cal.3d 146, 156.)

If the setting of the hearing were conducted in accordance with section 3044(a)(2), which was added by a voter-approved proposition known as "Marsy's Law" or in accordance with the consent decree in *Valdivia, et al. v. Schwarzenegger* (*Valdivia*), it would be held within 45 calendar days of the parolee's arrest. Because the courts are not a party to the *Valdivia* action, however, the 45-day limit established by the consent decree does not apply to court revocation proceedings under section 1203.2. Meanwhile, section 3044 of Marsy's Law has been challenged in federal court. There the court enjoined many of the provisions of the statute except for the requirement that violation hearings be held within 45 days of the parole hold being placed. The federal case, however, is on appeal. (See discussion of *Valdivia* and Marsy's Law, *infra*.)

The Legislature has clearly brought the parole revocation process under the umbrella of section 1203.2 such that the standard should be a "reasonable time." Because it is not clear whether Marsy's Law will establish the time limit, prudent courts may wish to hold violation hearings within 45 days of the parolee's arrest unless time is waived.

26. May a court use electronic recording equipment in lieu of a court reporter to create a record of a parole revocation hearing?

No. Under Government Code section 69957, courts may order an action or proceeding to be electronically recorded only in a limited civil case, or a misdemeanor or infraction case. Parole revocation hearings are neither misdemeanor nor infraction cases, and thus do not come within the definition of the types of proceedings for which electronic recording devices are permissible. In addition, although supervised persons are entitled to written findings that disclose the evidence relied on and reasons for the revocation (*Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *People v. Vickers* (1972) 8 Cal.3d 451, 457), a court reporter's transcript of the hearing that contains the court's oral statement of reasons may serve as a substitute for a written statement. (*People v Moss* (1989) 213 Cal.App.3d 532, 534.)

27. Which court adjudicates violations when a parolee is arrested on a parole violation in a different county than the one where the parolee is supervised? Who is responsible for transporting parolees in these circumstances?

The statutes do not directly address this issue. However, it is clear that jurisdiction over the parolee is established by section 3000.08(a): The parolee will "be subject to parole supervision by [CDCR] and the jurisdiction of the court in the county where the parolee is released or resides for the purpose of hearing petitions to revoke parole and impose a term of custody. . . ." (§ 3000.08(a).) Furthermore, section 3000.08(f) provides that if revocation of parole is being sought, DAPO shall "pursuant to section 1202.3, petition the court in the county in which the parolee is being supervised to revoke parole." These provisions strongly suggest the adjudication of any parole violations must be in the county of supervision.

Case law under section 1203.2 also supports the conclusion that violation hearings should be held in the county of supervision. (*People v. Klockman* (1997) 59 Cal.App.4th 621.)

However, requiring the adjudication to be in the county of supervision may violate the U.S. Supreme Court's requirement in *Morrissey* that the hearing be held physically close to the alleged violation so that witnesses will be available. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 484.) CDCR is seeking legislation to specifically allow violation hearings to be conducted in the county of supervision or the county in which a parolee is arrested for a new crime.

The statutes do not address which agency has the responsibility to transport the parolee to the proper county. It is unlikely that the burden will fall to the arresting county. Since physical supervision of the parolee is provided by DAPO, presumably the duty will fall to that agency to transport the offender to the county of supervision if the agency chooses to pursue prosecution of the violation. Transportation issues may be subject to adjustment depending on whether the arresting county also is pursuing an independent criminal prosecution against the parolee.

28. If parolees are found in violation of parole, what sanctions may courts impose?

If parolees are found in violation of parole, the courts have authority to do any of the following:

- Return the parolee to parole supervision with a modification of conditions, if appropriate, including a period of incarceration in county jail of up to 180 days for each revocation. (§ 3000.08(f)(1).) For every two days of actual custody served, the parolee will receive a total of four days of credit under section 4019(a)(5).

- Revoke parole and order the person to confinement in the county jail for up to 180 days. (§ 3000.08(f)(2).) For every two days of actual custody served, the parolee will receive a total of four days of credit under section 4019(a)(5).

- Refer the parolee to a reentry court pursuant to section 3015 or other evidence-based program in the court's discretion. (§ 3000.08(f)(3).)

- Place the parolee on electronic monitoring as a condition of reinstatement on parole or as an intermediate sanction in lieu of returning the parolee to custody. (§ 3004(a).)

29. May the courts return parolees to state prison?

Generally, no; the courts may not return parolees to state prison. The only exception is section 3000.08(h), which allows only designated parolees to be returned to prison on a parole violation. If the parolee is subject to life parole under sections 3000(b)(4) and 3000.1 for murder or designated sex offenses, and the court finds the parolee has violated the law or a condition of parole, the parolee "shall be remanded to the custody of [CDCR] and the jurisdiction of the [BPH] for the purpose of future parole consideration." (§ 3000.08(h).) Thereafter the BPH will schedule a hearing within 12 months to determine parole eligibility. (§ 3000.1(d).)

30. May parole supervision be transferred to a different county?

Yes. Although there is no formal statutory procedure for the transfer of an inmate's parole to a different county, DAPO regularly transfers parole supervision on an informal basis when deemed appropriate. The transfer process is not performed under section 1203.9, which is limited to transfer of persons on probation or mandatory supervision.

31. May the courts terminate parole?

No. Unlike section 3455(a)(2) for PRCS, section 3000.08(f)(2) does not contain language suggesting the courts have power to "terminate" parole. Furthermore, section 1203.2(a) specifies that the courts shall have no authority under that section to terminate parole. Section 1202.3, which generally governs the modification and early termination of other forms of supervision, does not apply to persons on parole. Finally, section 1203.2(b)(1) provides that a "person supervised on parole . . . may not petition the court pursuant to this section for early release from supervision. . . ."

32. What happens to an inmate's parole status if a new crime is committed and a court imposes either a state prison or section 1170(h) sentence?

The response by DAPO will depend on the nature of the new crime. If the parolee is on parole and commits a new crime punishable under section 1170(h), whether a straight or split sentence, DAPO will terminate its supervision so as not to duplicate supervision by county probation officers. If the parolee commits a crime punishable in state prison, DAPO will continue to supervise the parolee, adjusted to meet any new terms. Except for arrest on a suspected parole violation, "any person who is convicted of a felony that requires community supervision and who still has a period of state parole to serve shall discharge from state parole at the time of release to community supervision."

33. What parole services will be available to the courts and parolees on July 1, 2013?

Because DAPO will be responsible for the physical supervision of parolees, all supervision and treatment services will come through state parole. These services will

vary from region to region. A summary of available parole resources may be found at http://www.cdcr.ca.gov/community_partnerships/resource_directory.aspx.

Court-ordered treatment or supervision plans should be based on a validated risk assessment tool and the Parole Violation Decision Making Index (PVDMI).

34. May the parolee request modification of the conditions of parole?

Only on a limited basis. A "petition under [section 1203.2] shall not be filed solely for the purpose of modifying parole. Nothing in this section shall prohibit the court from modifying parole when acting on its own motion or a petition to revoke parole." (§ 1203.2(b)(1).)

35. May parolees accept proposed sanctions for violations without going through the court process?

Yes. At any time during the procedure on a violation, the parolee may choose to waive the right to counsel, admit the petition, waive the court hearing, and accept the recommended disposition. (§ 3000.08(f).)

36. Are the courts required to assess and order into execution a parole revocation restitution fine?

Yes. Courts are required to assess a "parole revocation restitution fine" under section 1202.45(a). The fine is to be imposed in addition to, and in the same amount as, the restitution fine imposed under section 1202.4(b), and is to apply to all persons convicted of a crime sentenced to prison where the term will include a period of parole. (§ 1202.45(a).) The fine is suspended unless the person's parole is revoked. (§ 1202.45(c).)

Prior to realignment, parole revocation restitution fines were collected by CDCR prison officials. Currently, PRCS revocation restitution fines may be collected by the agency designated by each county's board of supervisors under Penal Code section 2085.5. (§ 1202.45(b).) No comparable provision governs the collection of parole revocation restitution fines.

Any remaining unpaid fines, including restitution fines ordered pursuant to 1202.4 and 1202.45, may be collected by the California Victim Compensation and Government Claims Board once the parolee is no longer on parole. (§ 1214(a).)

37. Does Marsy's Law apply to parole revocation proceedings?

The answer is not clear. Section 3044(a), enacted by Marsy's Law in 2008, designates the rights available to parolees subject to parole revocation proceedings. These rights include the following:

- The right to a probable cause hearing no later than 15 days following arrest for the parole violation.
- The right to an evidentiary revocation hearing within 45 days following arrest for the parole violation.
- The right to counsel on a limited basis.
- The violation must be proved by a preponderance of the evidence by testimony, documentary evidence, or "hearsay evidence offered by parole agents, peace officers, or a victim." (§ 3044(a)(5).)

A potential conflict arises between Marsy's Law and realignment legislation because a number of the rights and procedures outlined in section 3044 are not included in section 1203.2, the statute that now governs proceedings for revocation of parole.

It is not clear whether the provisions of section 3044 apply to the courts. By its terms, the statute applies to "the [BPH] or its successor in interest. . . ." It is unclear whether in this context the courts, part of the judicial branch of government, can be "a successor in interest" to the BPH, part of the executive branch.

A federal district judge has invalidated as unconstitutional sections 3044(a), 3044(a)(1) – (3), 3044(a)(5), and 3044(b), except the court has ordered that violation hearings be held within 45 days of the hold being placed. (See *Valdivia v. Brown*, CIV S-94-671.) The matter is now on appeal to the Ninth Circuit Court of Appeal.

The Legislature has clearly brought the parole revocation process under the umbrella of section 1203.2 such that the hearing should be held within a "reasonable time." Because it is not clear whether Marsy's Law will establish the time limit, prudent courts may wish to hold the violation hearings within 45 days of the parolee's arrest unless time is waived.

38. Does the *Valdivia* consent decree apply to court proceedings adjudicating parole violations?

No. In 1994 a federal class action lawsuit was filed in the U.S. District Court in the Eastern District of California, alleging that then-existing parole revocation procedures violated due process rights of California parolees. The name of the case is *Valdivia, et al. v. Schwarzenegger*, No CIV S-94-0671 (*Valdivia*). In 2004, the parties to the action entered into an agreement whereby they agreed to the court's entry of a consent decree granting plaintiffs a permanent injunction, including various procedural protections for parolees. Among them are: 1) the right to appointed counsel beginning when the parolee is offered a stipulated disposition; 2) not later than 48 hours after a parole hold, the parole agent must confer with his or her supervisor regarding probable

cause to continue the hold; 3) a probable cause hearing held within 10 business days after the parolee is served with the notice of charges (by the third day after the placement of the hold); and 4) a final revocation hearing within 35 calendar days of placement of the parole hold (in recognition of Marsy's Law, the time limit for the hearing subsequently was changed to 45 days).

There are several reasons why the decree does not apply to the judicial branch:

a. The courts were not a party to the *Valdivia* action. (See *Local No. 93, Ass'n of Firefighters v. City of Cleveland* (1986) 478 U.S. 501, 529 ["And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree."].) The primary defendants in the action are the Governor, the California Youth and Adult Correctional Agency, CDCR, including the Parole and Community Services Division, and the Board of Prison Terms.

b. The consent decree merely reflects the settlement of the parties and does not establish a constitutional mandate. The court in *Valdivia v. Schwarzenegger* (9th Cir. 2010) 599 F.3d 984, 995, observed: "[W]hile the Injunction was put in place to remedy claimed constitutional violations, it is not clear that these procedures were *required* to remedy the violation of basic constitutional rights. The district court made this clear in the hearing prior to issuing the March 2009 order: '[I]n this case I never found any of the things that now everybody is concerned about, whether they were consistent with the Constitution of the United States or not. .... What I found was that the parties had agreed to get rid of this lawsuit. *There clearly were some procedures which were violative of the Federal Constitution,* and they said, "Look, we're going to solve this whole problem, and we, the plaintiffs, will give away some of our constitutional rights in order to gain these other rights."..... *It isn't really true* that this Court made a determination that these specific procedures *were required* by the Federal Constitution. The Court said, 'You guys are happy, I'm happy.' While these procedures were put in place in an attempt to remedy a claimed constitutional violation, they were not *necessary or required* by the Constitution. There is no indication anywhere in the record that these particular procedures are necessary for the assurance of the due process rights of parolees." (Emphasis original.)

c. California courts are under a duty to construe the new statutory scheme in a manner that is constitutional. The *Valdivia* court has not seen nor ruled on the constitutionality of the statutory procedures now applicable to parole. *Valdivia* is not authority for the resolution of the new issues that likely will arise as courts implement the new parole procedures. The new procedures are entitled to a presumption of constitutionality and should be interpreted in a manner that is consistent with the requirements of the constitution. (See *Skilling v. United States* (2010) ___ U.S. ___, 130 S.Ct. 2896, 2928; *Braxton v. Municipal Court* (1973) 10 Cal.3d 138, 145.)

39. Does the *Armstrong* injunction apply to court parole revocation proceedings?

No. The Armstrong injunction was issued in connection with a federal class action brought on behalf of disabled parolees regarding the application of the Americans with Disabilities Act (ADA) to parole proceedings. (*Armstrong v. Davis*, C-94-2307-CW.) The action was brought against the Governor, the Secretary of the California Youth and Adult Corrections Agency, and the Chairman of the California Board of Prison Terms. A permanent injunction was issued in June 2002 that defines the relationship between the ADA requirements and parole revocation procedures for disabled parolees, including conditions of facilities where revocation hearings are held. For the reasons discussed above in connection with the *Valdivia* case, the *Armstrong* injunction does not apply to the courts.

40. Is there a central contact or liaison between the courts and DAPO?

Not yet. DAPO is requesting authorization to hire "court revocation agents" for each parole region to assist in the court process. DAPO is preparing a contact list for use by the offices of the district attorney and will share that list with the courts.

41. What is the process for reviewing court decisions on petitions to revoke parole?

California case law on *probation* revocation is relevant. An order denying probation is reviewable on appeal. (*People v. Coleman* (1975) 13 Cal.3d 867, 871, fn. 1; *People v. Vickers* (1972) 8 Cal.3d 451, 453, fn. 2.) "An order granting probation and imposing sentence, the execution of which is suspended, is an appealable order. (§ 1237, subd. (a); cf. *People v. Preyer* (1985) 164 Cal.App.3d 568, 576; *People v. Chagolla* (1984) 151 Cal.App.3d 1045, 1049.) An order modifying the terms of probation is likewise appealable because it is an order following judgment that affects the substantial rights of the defendant. (§ 1237, subd. (b); see *People v. Douglas* (1999) 20 Cal.4th 85, 91; *In re Bine* (1957) 47 Cal.2d 814, 817.)" (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.)

An order entered by the court concerning an inmate's parole status likely is appealable under section 1237(a) in the same manner, since it is an order entered after judgment and it affects the substantial rights of the parties.

Contact:

Barbara Whiteoak, Executive Secretary, AOC Criminal Justice Court Services Office, 415-865-4603, barbara.whiteoak@jud.ca.gov