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S181788

IN THE SUPREME COURT OF CALIFORNIA

In re DAVID LUCAS, Petitioner,

California Supreme Court
Case No. _____

Court of Appeal, 3rd Dist.
Case No. C062809

Placer County Superior Court
Case No. SCV-23989

PETITION FOR REVIEW

From Denial of Petition for Writ of Habeas Corpus by the Court of Appeal,
Third Appellate District

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	Court of Appeal, 3rd Dist. Case No. C062809
	Placer County Superior Court Case No. SCV-23989

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

Petitioner David Lucas seeks review of the denial of his petition for writ of habeas corpus by the Court of Appeal, Third Appellate District. Petitioner believes that the Sexually Violent Predator petition pending against him in Placer County should be dismissed in that petitioner was not in the lawful custody of the Department of Corrections at the time the Sexually Violent Predator petition was filed, and in that the unlawful custody was not the result of a good faith mistake of law or fact.

The opinion of the Third District Court of Appeal was filed March 5, 2010, and is appended to this petition. A petition for rehearing was not filed by petitioner in the Court of Appeal.

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STATEMENT OF ISSUES

In May, 2003, the petitioner, David Lucas, was convicted in Placer County of failure to register as a sex offender, Penal Code section 290(g)(2), a felony. For that offense, a prior serious felony, and a prison prior, he was sentenced to the California Department of Corrections for a term of seven years. His release date was computed to be October 12, 2008.

On December 21, 2007, an officer at Corcoran State prison performed an initial screening to determine whether the petitioner met the criteria for commitment as a sexually violent predator. The officer concluded that the petitioner met the SVP criteria.

No further action occurred as a result of this screening until October 1, 2008, eleven days before the petitioner's scheduled release date, when the initial screening form was processed by the Department of Corrections and Rehabilitation's Classification Services Unit in Sacramento.

On October 9, 2008, three days before the petitioner's scheduled release date, the Board of Parole Hearings imposed a 45-day hold pursuant to Welfare & Institutions Code section 6601.3 "to facilitate full SVP evaluations to be concluded by the DMH." No other explanation or justification for the hold was given.

During the 45-day hold period, the petitioner was evaluated by four psychologists from the Department of Mental Health, three of whom concluded he met the SVP criteria. On November, 20, 2008 – still within the 45 days – the Placer County District Attorney's Office filed a petition to commit the petitioner as a sexually violent predator.

Welfare & Institutions Code section 6601(a)(2) provides that an SVP petition may be filed against a person serving a determinate prison sentence, a parole violation, or who is being held for 45 days under W&I section 6601.3. It also provides that a

petition may not be dismissed based on a later judicial or administrative determination that the person's custody was unlawful, if the unlawful custody was "the result of a good faith mistake of fact or law."

W&I Code section 6601.3 provides that, "Upon a showing of good cause," the Board of Prison Terms [now the Board of Parole Hearings] may order that a person referred to the Department of Mental Health for evaluation as a sexually violent predator remain in custody for no more than 45 days beyond the person's scheduled release date for full evaluation.

Petitioner's counsel set forth the legislative history of section 6601.3 in some detail in the habeas petition filed in the Court of Appeal. Section 6601.3 was added to the SVP Act, at the urging of the Department of Corrections, in order to allow the SVP evaluation process to be completed in cases where, due to circumstances beyond the Department's control, the evaluation process cannot be completed prior to the inmate's release date. In numerous reports to the legislature, submitted as exhibits by petitioner in the Court of Appeal, the Department of Corrections argued that 45-day extensions were necessary in cases where an inmate's release date is advanced unexpectedly as the result of administrative or judicial action, and in cases where a parole violator is returned to custody for a period of six months or less.

None of these circumstances existed in petitioner's case. By the time the 45-day hold was imposed on October 9, 2008, he had been in uninterrupted CDCR custody for almost five and-a-half years.

The Court of Appeal agreed with petitioner that there was no good cause for the 45-day hold in this case, and that the petitioner was therefore not in lawful CDCR custody at the time the petition was filed.

The Court of Appeal nevertheless denied the petition, attributing petitioner's unlawful custody to a good faith mistake of fact or law. That court reasoned that the

Board of Parole Hearings imposed the 45-day hold based on Section 2600.1(d) of Title 15 of the California Code of Regulations. Section 2600.1(d) defines good cause for purposes of W&I section 6601.3 as (1) some evidence that the person has committed a qualifying offense, and (2) some evidence that the person is likely to engage in sexually violent predatory behavior in the future. Section 2600.1(d) does not require a showing that any unusual circumstance prevented the Department from completing the SVP evaluation process prior to the inmate's release date.

The Court of Appeal held that section 2600.1(d) is invalid, since it is inconsistent with the legislative purpose described above. Nevertheless, the court held, relying on *People v. Hubbart* (2001) 88 Cal.App.4th 1202, that since no court had made that determination before now, the Board of Parole Hearings had been entitled to rely on Section 2600.1(d) at the time the Board imposed the 45-day hold in this case.

Therefore, in petitioner's view, this case presents two issues:

(1) When a government agency, such as the Department of Corrections and Rehabilitation, asks the Legislature to enact a statute for use in exigent circumstances, then proceeds to use that statute when no exigent circumstances exist, or uses the statute to avoid the consequences of its own negligence, is the agency acting in good faith or bad faith?

(2) In a sexually violent predator case, when the Department of Corrections simply neglects to have the SVP evaluation process completed prior to the inmate's release date, then imposes a 45-day hold, is the unlawful custody – for purposes of the good faith rule of section 6601(a)(2) -- the result of that negligence, the result of the decision to impose the hold, or the result of both?

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WHY REVIEW SHOULD BE GRANTED

Unfortunately, it does not appear to be unusual for the Department of Corrections to be unable to complete the SVP evaluation process prior to the inmate's release date, even when the Department has ample time to do so. See, e.g., *People v Superior Court (Small)* (2008) 159 Cal.App.4th 301; *In re Hovanski* (2009) 174 Cal.App.4th 1517.

The decision of the Court of Appeal in petitioner's case is prospective in its application. It does not apply in any case where the 45-day hold was imposed prior to March 5, 2010. There are likely to be pending SVP cases, as well as cases that have not yet entered the judicial system, where 45-day holds have been imposed absent a showing that the evaluation process could not have been completed sooner.

In those cases, the issues will be the same as the issues raised by this case. Was the hold the result of administrative neglect? Was the hold the result of good-faith reliance on Section 2600.1(d)? Or was the hold imposed simply to avoid having to release the inmate?

But the issue here goes beyond compliance with the provisions of the Sexually Violent Predator Act. It goes to the integrity of the legislative process itself. Should a government agency be allowed to persuade the legislature to enact a statute for a legitimate purpose, then use that statute for whatever purpose it chooses, even if that purpose is to cover up its own mistakes?

In petitioner's view, it is the responsibility of the courts to act when they see a government agency playing fast and loose with the terms of a statutory provision the agency itself sponsored in the Legislature.

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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF CASE AND FACTS

On May 13, 2003, the petitioner, David Lucas, was convicted of a violation of Penal Code section 290(g)(2), failure to register as a sex offender, a felony, in Placer County. For that offense, a prior serious felony, and a prison prior, Mr. Lucas was committed to CDCR for a term of seven years.

Mr. Lucas was received at DVI (Deuel Vocational Institution) on May 21, 2003. His release date was computed to be October 12, 2008. He was transferred to Corcoran (California Substance Abuse Treatment Facility) on September 25, 2003. He served the entire term at Corcoran [CDCR Chronological History, Court of Appeal Writ Exhibit C].

On December 21, 2007, an officer at Corcoran, L. Baker, conducted an initial screening to determine whether the petitioner met the criteria for commitment as a sexually violent predator. The officer concluded that the petitioner met the criteria.

No further action occurred as a result of this screening, until the screening form was received at CDCR's Classification Services Unit in Sacramento on October 1, 2008, eleven days before Mr. Lucas's scheduled release date [CDC Form 7377, stamped "RECEIVED October 1, 2008, Classification Services," Court of Appeal Writ Exhibit E].

The next day, David Lowe, a correctional counselor in the Classification Services Unit, completed the form 7377, stating that he disagreed with the finding made at Corcoran that Mr. Lucas met the SVP criteria. Mr. Lowe changed the finding from "Yes" to "Maybe," due to "missing court documents for the current and qualifying offenses." He annotated the form "Case Expedited. DBL 10-2-08" [Court of Appeal Writ Exhibit E].

The same day, Mr. Lowe sent a memo to the Board of Parole Hearings referring

the case to BPH for its determination as to whether Mr. Lucas met the initial SVP criteria, saying "CDCR is unable to make a final determination based on the available documentation" [Memo dated October 2, 2008, Court of Appeal Writ Exhibit F].

On October 7, 2008, Sara Lopez, an official with the Board of Parole Hearings, sent a letter to the Director of the California Department of Mental Health, referring the case to DMH. In the letter, Ms. Lopez stated that an independent review of the case by BPH had determined that Mr. Lucas met the first level sexually violent predator criteria [Letter dated October 7, 2008, Court of Appeal Writ Exhibit G].

On October 9, 2008, Mark Wolkenhauer, Psy.D., conducted a Level II Screen of the case. This screen covered Mr. Lucas's criminal history, evidence regarding mental disorder, a Static-99 risk assessment, and additional risk factors. Wolkenhauer recommended Mr. Lucas be referred for evaluation by the Department of Mental Health [Level II Screen, dated October 9, 2008, Court of Appeal Writ Exhibit H].

On October 9, 2008, three days before Mr. Lucas's scheduled release, the Board of Parole Hearings imposed a 45-day hold, pursuant to Welfare & Institutions Code section 6601.3, "to facilitate full SVP evaluations to be concluded by the DMH." The hold was effective from October 12, 2008, until November 26, 2008 [BPH Form 1135, dated October 9, 2008, Court of Appeal Writ Exhibit I].

On October 17, 2008, Dr. Michael Musacco, a psychologist and DMH evaluator, attempted to interview Mr. Lucas at Corcoran. Mr. Lucas declined to speak with Dr. Musacco. Dr. Musacco concluded, based on a review of the records, that Mr. Lucas did not meet the SVP criteria [Dr. Musacco's report, Court of Appeal Writ Exhibit J].

On October 20, 2008, Dr. Jesus Padilla, a psychologist, attempted to interview Mr. Lucas at Corcoran. Again, Mr. Lucas declined to speak with the evaluator. Dr. Padilla concluded in his report that Mr. Lucas met the SVP criteria.

On October 23, 2008, Dr. Nancy Reuschenberg, a psychologist, contacted Mr.

Lucas at Corcoran. Mr. Lucas agreed to this interview, which lasted an hour and forty-five minutes. Dr. Reuschenberg concluded in her report that Mr. Lucas met the SVP criteria.

On November 10, 2008, Dr. Robert Owen, a psychologist, attempted to interview Mr. Lucas. Mr. Lucas declined. Dr. Owen concluded in his report that Mr. Lucas met the SVP criteria.

On November 17, 2008, Dr. Stephen Mayberg, the DMH director, sent a letter to the Placer County District Attorney, referring Mr. Lucas's case for civil commitment proceedings under the SVP Act [Dr. Mayberg's letter, Court of Appeal Writ Exhibit L].

On November 20, 2008, the Placer County District Attorney's office filed a petition seeking commitment of Mr. Lucas as a sexually violent predator, and a request that the matter be set for urgency review as provided in Welfare & Institutions Code section 6601.5, given that Mr. Lucas's 45-day hold was set to expire November 26, 2008. The matter was set for hearing November 25, 2008, in Department 13 of the Superior Court.

On November 26, 2008, the court found that the petition stated sufficient facts to support a finding of probable cause

On June 9, 2009, petitioner's counsel filed a petition for writ of habeas corpus in the Appellate Division of the Placer County Superior Court on the grounds that the late completion of the SVP evaluation process had resulted in constitutional and statutory violations [Court of Appeal Writ Exhibit O].

On July 27, 2009, the Superior Court (Judge Nichols) issued an order denying the petition [Court of Appeal Writ Exhibit R].

On September 3, 2009, petitioner's counsel filed a petition for writ of habeas corpus in the Third District Court of Appeal. The petition stated the same grounds as the habeas petition in the trial court.

On October 22, 2009, the Court of Appeal issued an Order to Show Cause, limited to the claim that petitioner's extended commitment was unlawful because there was no showing of good cause as required by Welfare & Institutions Code section 6601.3.

In an opinion published March 5, 2010, the Court of Appeal denied the petition. The Court agreed with petitioner that no good cause had been shown for imposition of the 45-day hold. The Court agreed with petitioner that Section 2600.1(d) of Title 15 of the Code of Regulations is invalid in that it does not include exigent circumstances in its definition of good cause for purposes of Welfare &Institutions Code section 6601.3. Nevertheless the Court of Appeal denied the petition on the ground that the action of the Board of Parole Hearings was the result of a good faith mistake of fact or law.

ARGUMENT

I

IN PETITIONER'S CASE, THE DELAY IN COMPLETING THE SVP EVALUATION PROCESS, NOT THE ACTION OF THE BOARD OF PAROLE HEARINGS, WAS THE PRIMARY CAUSE OF PETITIONER'S UNLAWFUL CUSTODY

In the Court of Appeal, petitioner argued, and the court agreed, that good cause did not exist for imposition of the 45-day hold by the Board of Parole Hearings on October 9, 2008.

The Court of Appeal nevertheless denied the petition on the premise that negligence on the part of the Department of Corrections in completing the evaluation "is pertinent only to whether there was good cause for placing the 45-day hold," and not to whether petitioner's unlawful custody was the result of a good faith mistake of fact or law. Court's Opinion, Appendix, p. 23.

In deciding whether the petitioner's unlawful custody was the result of a good faith mistake of fact or law, The Court of Appeal examined only the action of the Board of Parole Hearings on October 9, 2008, and disregarded the inaction of the Department of

Corrections from December 2007, to October, 2008. Evidently the Court of Appeal believed that because BPH's order was the *last* thing that happened to cause petitioner's unlawful custody, it was the *only* thing that mattered.

But it wasn't. In order for the good faith exception of Section 6601(a)(2) to apply, the inmate's unlawful custody must be the *result* of a good faith mistake of fact or law, not the result of something else. The Court of Appeal did not ask, and did not answer, the question whether petitioner's unlawful custody after October 12, 2008, *resulted* from CDCR's negligence, the Board's action, or both.

The Board's action on October 9, 2008, did not occur in isolation. The Board's action was the inevitable result of the nine-and-a-half month lapse in the evaluation process that preceded it. Had there been no delay in the evaluation process, there would have been no 45-day hold and no unlawful custody. (Unexplained delay in completing the SVP evaluation process does not itself constitute a good faith mistake of fact or law under Section 6601(a)(2). *People v. Superior Court (Small)* (2008) 159 Cal.App.4th 301, 309-310.)

The rules of causation that apply in civil and criminal actions are instructive here. In a civil case, if a defendant's negligence combines with some other factor to cause a particular harm, the defendant is legally responsible for the harm if his or her negligence is a substantial factor in causing the harm. The defendant does not avoid responsibility because some other person, or some other factor, was also a substantial factor in causing the harm. California Civil Jury Instruction (CACI) No. 431, 2010 Edition.

A "substantial factor" is defined as "a factor that a reasonable person would consider to have contributed to the harm." CACI No. 430. "It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." *Ibid.*

Likewise, in a criminal case, an act is considered the cause of an injury or other condition if it is a substantial factor in causing the injury or condition. "A substantial

factor is more than a trivial or remote factor. However, it does not have to be the only factor that causes the injury" or condition. California Criminal Jury Instruction (CALCRIM) No. 240, 2008 Edition.

The nine and-a-half-month delay in the SVP evaluation process was not just a substantial factor in causing the petitioner's unlawful custody, it was the predominant factor.

People v. Hubbart (2001) 88 Cal.App.4th 1202, relied on by the Court of Appeal, did not involve negligence of any kind. Hubbart's parole was revoked in 1993 under Section 2616(a)(7) of Title 15 of the Code of Regulations. At the time, Section 2616(a)(7) permitted revocation in cases where there was evidence the parolee was suffering from a mental disorder. In 1996, while still in custody under Section 2616(a)(7), an SVP petition was filed. Subsequently, in *Terhune v. Superior Court (Whitley)* (1998) 65 Cal.App.4th 864, subdivision (a)(7) of Section 2616 was invalidated on the ground that the Legislature had intended that the MDO and SVP Acts, rather than parole provisions, apply in cases where an inmate or parolee is believed to suffer from a serious mental disorder. Because no court had yet addressed the validity of subsection (a)(7) at the time the SVP petition was filed against Hubbart, the court attributed his being in custody to a good faith mistake of law. "*There is no evidence of any negligence* [emphasis added] or intentional wrongdoing here." *Hubbart*, at p. 1229.

In petitioner's case, by contrast, negligence – from December 21, 2007, until October 1, 2008 – is precisely what caused the 45-day extension, and petitioner's unlawful custody, in the first place.

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II

THE DEPARTMENT OF CORRECTIONS DID NOT ACT IN GOOD FAITH WHEN IT DRAFTED SECTION 2600.1(d) OF THE CODE OF REGULATIONS; THEREFORE THE BOARD OF PAROLE HEARINGS WAS NOT ACTING IN GOOD FAITH WHEN IT IMPOSED THE 45-DAY HOLD IN PETITIONER'S CASE

The Sexually Violent Predator Act went into effect in California January 1, 1996. Section 6601.3 was added to the law as a "clean-up" provision January 25, 1996. A.B. 1496, Stats. 1996, chap. 4, sect. 2.

In a report to Gov. Davis, urging him to sign A.B. 1496, officials of the Department of Corrections explained section 6601.3 as follows:

> It allows for a 45-day hold on an inmate or parolee who has been referred for evaluation to DMH ... in instances where the inmate/parolee would otherwise be released from custody in less than 45 days. These instances have arisen, and will continue to do so, for two reasons.
>
> First, in the initial year of the SVP law's operation the referral process is in a status where it is not possible to identify all eligible inmates and have them processed through a probable cause determination prior to their release date. This is a necessary consequence of the Act's waiver, during the first year, of the requirement CDC make such referrals at least 6 months prior to the inmate's release.
>
> Second, there will always be inmates whose release dates are advanced through judicial or administrative action so as to collapse the 6 month lead time, either before the process of referral has begun or before a probable cause determination can be made.
>
> Enrolled Bill Report, Department of Corrections, January 25, 1996, p.2 [Court of Appeal Traverse Exhibit A].

Section 6601.3 was re-enacted in 1998 after a sunset provision in the original measure took effect January 1, 1998. S.B. 536, Stats. 1998, chap.19, sect. 1, effective April 14, 1998.

In an analysis prepared for a hearing of the Assembly Committee on Public Safety July 8, 1997, the committee's chief counsel explained that S.B. 536, like its

predecessor, would:

> permit the Board of Prison Terms (BPT) to order a person who has been referred to the DMH for evaluation to remain in custody for no more than 45 days for evaluation in those circumstances when the restoration of time credits to the person's term of imprisonment renders the normal time frames for SVP commitment impracticable.
>
> Analysis, Assembly Committee on Public Safety, July 8, 1997, pps. 1, 3 [Court of Appeal Traverse Exhibit B].

An analysis of S.B. 536 by the Department of Finance dated August 20, 1997, states:

> Most referrals for [SVP] evaluation will be made months prior to release on parole, however, there will be instances where release dates are modified by judicial or administrative actions. If the individual is suspected of being an SVP, continuation of this language [provision for 45-day holds] allows for the individual to be held, if necessary, beyond their release date for the completion of the evaluation.
>
> Department of Finance Bill Analysis, August 20, 1997, p. 2 [Court of Appeal Traverse Exhibit C].

According to an analysis of S.B. 536 prepared for the August 27, 1997, hearing of the Assembly Appropriations Committee, the measure would permit the imposition of 45-day holds "when restoration of sentence credits renders the normal time frames [for] SVP commitment unworkable." Analysis, Assembly Committee on Appropriations, date of hearing August 17, 1997, p. 1 [Court of Appeal Traverse Exhibit D].

In a report to Gov. Davis recommending that he sign S.B. 536, corrections officials gave this justification:

> It is important to identify these persons [potential SVP's] early in their incarceration in order for the DMH evaluation to be completed by the time the person would otherwise parole from prison, at which time they can be turned over to county jurisdiction for civil commitment trial. Many persons, especially parole violators, serve a very short time in prison (often 6 months or less). It is difficult to complete the identification process and DMH evaluation by the time they would be released to serve parole.

> S.B. 536 would reestablish W&I Code Section 6601.3 allowing BPT to place a hold ... on these persons for up to 45 days for DMH to complete their evaluation.
>
> Enrolled Bill Report, dated April 8, 1998, p. 1 [Court of Appeal Traverse Exhibit E].

Section 6601.3 was re-enacted in its present form – including the provision for a showing of good cause – June 26, 2000. S.B. 451, Stats. 2000, chap. 41, sect. 1. The legislative background of the 2000 measure is consistent with that of the earlier measures.

An analysis prepared for the Assembly Appropriations Committee hearing April 12, 2000, states:

> The bill also clarifies that an inmate referred to the SVP process may be detained 45 days beyond the scheduled release date (emphasis in the original), in order to cover situations in which an inmate's release date may be un-expectedly moved up, or when a parole revocation term allows insufficient time to complete the evaluation process.
>
> Analysis, Assembly Committee on Appropriations, p. 1, hearing date April 12, 2000 [Court of Appeal Traverse Exhibit F].

In a report to Gov. Davis, recommending that he sign S.B. 451, officials of the Department of Corrections, which had sponsored the measure, repeated this explanation verbatim. Enrolled Bill Report, Department of Corrections, June 12, 14, 2000, p. 2 [Court of Appeal Traverse Exhibit G].

In a report to Gov. Davis, recommending that he sign the bill, officials of the Department of Mental Health stated it was "important that this provision be used appropriately for the purpose of keeping the SVP process moving, rather than to increase the number of persons placed on 45-day holds." Enrolled Bill Report, Health and Human Services Agency, June 14, 2000, p. 2 [Court of Appeal Traverse Exhibit H].

The report also pointed out that the reason 45-day holds were created in the first place was to accomodate the large number of inmates who had to be evaluated

when the SVP Act first went into effect January 1, 1996, and that the use of 45-day holds had greatly diminished since then. [Court of Appeal Exhibit H, p. 3].

When the Department of Corrections drafted Section 2600.1(d) of the Code of Regulations, which defines "good cause" for purposes of Section 6601.3, it *made no mention* of any of the circumstances it had described to the Legislature as making 45-day holds necessary. Section 2600.1(d) simply defines "good cause" as "some evidence" the inmate has committed a qualifying offense in the past, and "some evidence" the inmate is likely to commit sexually violent predatory offenses if released into the community. Section 2600.1(d) does not require any showing that the SVP evaluation process could not have been completed prior to the inmate's original release date.

In petitioner's case, the order imposing the 45-day hold [Court of Appeal Writ Petition Exhibit I] does not contain any reference to "good cause" or to Section 2600.1(d). It is not clear if the Board of Parole Hearings was relying on Section 2600.1(d) at all. Even if the Board was relying on Section 2600.1(d), it could not have been relying on it in good faith. Section 6601.3 was enacted in 1996, and re-enacted in 1998 and 2000. Each time, the Department of Corrections justified the measure on the ground that, in limited circumstances beyond its control – short terms for parole violators, modifications of sentence, adjustments of time credits -- SVP evaluations cannot be completed prior to the inmate's release date. The Board of Parole Hearings is a branch of the Department of Corrections. When a government agency persuades the Legislature that a measure is necessary in unusual circumstances beyond its control, then proceeds to use that measure when there are no unusual circumstances, or worse, when the circumstances involve the agency's own negligence, the agency is acting in bad faith, not good faith.

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III

CONCLUSION

The action of the Board of Parole Hearings on October 9, 2008, cannot be disconnected from the circumstances that led up to it. To consider the Board's action as isolated from the defective drafting of Section 2600.1(d), and isolated from the negligence of the Department of Corrections in failing to follow up on petitioner's initial SVP screening until the last minute, is to rewrite reality. Human events rarely occur in isolation from other events, and this one certainly didn't.

It is bad enough the Department of Corrections misrepresented the purpose of Section 6601.3 of the Welfare & Institutions Code when it published Section 2600.1(d) of the Code of Regulations. To then use Section 2600.1(d) to avoid the consequences of the Department's own negligence, and claim to be doing so in good faith, of all things, is to add insult to injury

The Court of Appeal believed that the Department's negligence was relevant as to *good cause* under Section 6601.3, but not as to *good faith* under Section 6601(a)(2). The language of Section 6601(a)(2) suggests otherwise. In order for the good faith exception of Section 6601(a)(2) to apply, the unlawful custody must be the *result* of a good faith mistake of fact or law. It cannot be the result of something else. Under the legal rules of causation, and under the rules of common sense, the Department's inaction over a period of nine-and-a-half months, not the Board's action, was the predominant cause of petitioner's unlawful custody after October 12, 2008.

Petitioner is asking this Court to grant review to provide guidance to the lower courts, to parties to sexually violent predator cases, and to the Department of Corrections, as to the proper meaning and purpose of Welfare & Institutions Code section 6601.3.

For the reasons stated, this petition for review should be granted and the case set for argument.

Dated: April 12, 2010

Respectfully submitted,

Richard H. Kohl
Assistant Public Defender
Attorney for Petitioner David Lucas

WORD-COUNT CERTIFICATE

I hereby certify, under penalty of perjury, that the foregoing petition for review contains 5,093 words, as determined by the word-processing program used to prepare the petition.

Dated: April 12, 2010

Respectfully submitted,

Richard H. Kohl
Assistant Public Defender
Attorney for Petitioner David Lucas

APPENDIX

Opinion of the Court of Appeal, Filed March 5, 2010 (182 Cal.App.4th 797)

Filed 3/5/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

In re DAVID LUCAS on Habeas Corpus.	C062809
	(Super. Ct. No. SCV23989)

ORIGINAL PROCEEDING: Petition for writ of habeas corpus. Petition denied.

Richard A. Ciummo & Associates, Jonathan Richter and Richard H. Kohl for Petitioner.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Jeffrey D. Firestone and Jennifer M. Poe, Deputy Attorneys General, for Respondent.

In this habeas proceeding, petitioner David Lucas claims that when the Placer County District Attorney filed the petition to commit him as a sexually violent predator in November 2008, he was not in the lawful custody of the Department of Corrections and Rehabilitation (corrections) because the Board of Parole Hearings (the board) had extended his custody for 45

days under Welfare and Institutions Code[1] section 6601.3 without the showing of good cause required by that statute. We agree. As Lucas argues, the definition of good cause contained in subdivision (d) of section 2600.1 of title 15 of the California Code of Regulations (regulation 2600.1(d)) is inconsistent with the legislative intent behind the statutory good cause requirement. Thus, to the extent the board relied on the regulation in extending Lucas's incarceration, Lucas's custody was unlawful.

As we will explain, however, this conclusion does not entitle Lucas to any relief. Because Lucas has not carried his burden of proving otherwise, we must conclude the board did, in fact, rely on regulation 2600.1(d) in placing the 45-day hold on Lucas. Furthermore, although we conclude the regulation's formulation of good cause is inconsistent with the governing statute, the regulation was apparently valid when the board relied on it. Under subdivision (a)(2) of section 6601 (section 6601(a)(2)), a petition to commit a person as a sexually violent predator cannot be dismissed on the ground the person's custody was unlawful if the unlawful custody was the result of a good faith mistake of fact or law. That is the case here. The board's presumptive reliance on regulation 2600.1(d) constitutes a good faith mistake of law. Accordingly, we will deny Lucas's petition.

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[1] All further section references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

Lucas was in prison serving a seven-year determinate sentence for failing to register as a sex offender and was scheduled to be released on parole on October 12, 2008. On December 21, 2007 -- well in advance of his parole release date -- corrections personnel completed a sexually violent predator screening and determined that Lucas met the criteria as a potential sexually violent predator. Nothing further happened, however, until October 1, 2008 -- 11 days before his parole release date -- when the screening form was received by corrections's classification services unit.

Unable to make a final determination based on available documentation, corrections referred the matter to the board the next day. On October 7, the board referred the matter to the Department of Mental Health (mental health) for assessment. On October 9, a psychiatrist conducted a level II screening and referred the matter for a level III evaluation. It was now only three days before Lucas's release date.

The same day the matter was referred for a level III evaluation, the board placed a 45-day hold on Lucas pursuant to section 6601.3 "to facilitate full [sexually violent predator] evaluations to be concluded by [mental health]." Consequently, Lucas's release date was extended to November 26, 2008.

During the period of the hold, four psychologists evaluated Lucas; three of them concluded he met the sexually violent predator criteria. On November 17, mental health sent a letter to the Placer County District Attorney recommending that Lucas

be committed as a sexually violent predator. The district attorney filed a commitment petition on November 20. On November 26, the court found the petition was sufficient to support a finding of probable cause to believe Lucas is a sexually violent predator and set a probable cause hearing for December 3.

On December 3, Lucas waived time for the probable cause hearing. In April 2009, he moved to dismiss the petition on the ground that the late completion of the screening and evaluation process had resulted in constitutional and statutory violations. As pertinent here, Lucas argued there was no showing of good cause to keep him in custody beyond October 12, 2008, pursuant to section 6601.3 and his unlawful custody was not the result of a good faith mistake of law or fact.

In opposition to the motion to dismiss, the district attorney argued it was up to the board to determine whether there was good cause to extend Lucas's custody under section 6601.3 and the board acted well within its statutory authority. In the district attorney's view, good faith mistake of law or fact was not an issue because there was no unlawful custody.

In denying Lucas's motion, the court did not expressly conclude that the board had good cause to place a 45-day hold on Lucas pursuant to section 6601.3, but stated generally that it did "not find . . . any violation of a statutory procedure in what was done here. . . . [E]very stage of the process was within the defined statutory periods."

On May 6, 2009, further proceedings on Lucas's commitment as a sexually violent predator were stayed to allow him to seek writ review. In June 2009, Lucas filed a habeas corpus petition in the appellate division of the superior court. As pertinent here, in denying Lucas's petition the court concluded that "[a]lthough [corrections] waited until the last minute, the fact remains that the process was completed within the statutory framework."

On September 3, 2009, Lucas commenced the present proceeding by filing a habeas corpus petition in this court. Following receipt of the People's opposition, we directed that an order to show cause issue "limited to the claim that [Lucas]'s extended commitment under Welfare & Institutions Code section 6601.3 was unlawful because there was no 'showing of good cause' as required by this statute."

DISCUSSION

I

Legal Principles

"The [Sexually Violent Predator Act (§ 6600 et seq.) (the act)] provides for the involuntary civil commitment of an offender immediately upon release from prison if the offender is found to be [a sexually violent predator]. [Citation.] The [act] 'was enacted to identify incarcerated individuals who suffer from mental disorders that predispose them to commit violent criminal sexual acts, and to confine and treat such individuals until it is determined they no longer present a threat to society.' [Citations.] [A sexually violent predator]

is defined as 'a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.' (§ 6600, subd. (a)(1).)" (*Lee v. Superior Court* (2009) 177 Cal.App.4th 1108, 1122.)

The commitment process under the act begins when the secretary of corrections "determines that an individual who is in custody under the jurisdiction of . . . Corrections . . . , and who is either serving a determinate prison sentence or whose parole has been revoked, may be" a sexually violent predator. (§ 6601, subd. (a)(1).) When that happens, the secretary must "refer the person for evaluation in accordance with this section" "at least six months prior to that individual's scheduled date for release from prison."[2] (*Ibid.*)

The first step in the evaluation process is a preliminary "screening" performed by corrections and the board "based on whether the person has committed a sexually violent predatory offense and on a review of the person's social, criminal, and institutional history." (§ 6601, subd. (b).) "If as a result of this screening it is determined that the person is likely to

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[2] This six-month deadline does not apply "if the inmate was received by [corrections] with less than nine months of his or her sentence to serve, or if the inmate's release date is modified by judicial or administrative action." (§ 6601, subd. (a)(1).)

be a sexually violent predator, . . . Corrections . . . shall refer the person to . . . Mental Health for a full evaluation of whether the person meets the criteria in Section 6600." (§ 6601, subd. (b).)

During the "full evaluation" conducted by mental health, the person is evaluated by two psychologists or psychiatrists. (§ 6601, subds. (b) & (d).) If after examining the person both professionals agree he or she "has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody," a commitment petition may be filed. (§ 6601, subds. (d) & (i).) When there is a split of opinion between the evaluators, independent professionals are brought in to evaluate the person, and a petition may be filed only if both independent evaluators believe he or she meets the sexually violent predator criteria. (§ 6601, subds. (e) & (f).)

"Upon a showing of good cause, the Board . . . may order that a person referred to . . . Mental Health pursuant to subdivision (b) of Section 6601 remain in custody for no more than 45 days beyond the person's scheduled release date for full evaluation pursuant to subdivisions (c) to (i), inclusive, of Section 6601." (§ 6601.3.) A petition to commit a person as a sexually violent predator may be filed only "if the individual [i]s in custody pursuant to his or her determinate prison term, parole revocation term, or a hold placed pursuant to Section 6601.3, at the time the petition is filed." (§ 6601(a)(2).)

While section 6601 requires *actual* custody to file a sexually violent predator petition, "*lawful* custody has never been a jurisdictional prerequisite to filing [a] petition" under the act. (*People v. Wakefield* (2000) 81 Cal.App.4th 893, 898, italics added; see also *People v. Superior Court (Small)* (2008) 159 Cal.App.4th 301, 306-307.) Thus, the fact that a person was unlawfully in custody at the time the petition was filed does not necessarily preclude or invalidate proceedings on the petition. The act specifically provides that "[a] petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law." (§ 6601(a)(2).) "This necessarily implies that the petition *should* be dismissed if the unlawful custody was *not* the result of a good faith mistake." (*People v. Badura* (2002) 95 Cal.App.4th 1218, 1224.)

With these principles in mind, we turn to Lucas's arguments.

II

Good Cause Under Section 6601.3

Lucas contends he "was . . . not in the lawful custody of [corrections] at the time the [sexually violent predator] petition was filed November 20, 2008" because the section 6601.3 hold was placed on him "without a showing of good cause." We agree.

Under section 6601.3, the board may extend a person's custody for no more than 45 days so that mental health can

complete a full sexually violent predator evaluation, but only "[u]pon a showing of good cause." The question before us is what constitutes "good cause" for such an extension and whether it was shown here.

Pointing to the form the board used to issue the 45-day hold, Lucas notes that "[n]o . . . reason or explanation for the hold is given" except for the board's statement that the purpose of the hold was "to facilitate full [sexually violent predator] evaluations to be concluded by" mental health. From this, Lucas argues that the board imposed the hold "simply because [corrections] neglected to complete the screening process and refer the case to [mental health] earlier." In Lucas's view, "[t]o interpret Section 6601.3 to mean that good cause exists for a 45-day extension of custody in every case where a full [sexually violent predator] evaluation has not been completed prior to the person's release date would be to render the [good cause requirement] surplusage, in violation of the rules of statutory construction."

The People argue that giving the term a "common sense meaning" and a "straightforward interpretation," "Good cause exists if the person in custody may be" a sexually violent predator. In support of this argument, the People point to regulation 2600.1(d), which provides in pertinent part as follows:

"[G]ood cause to place a 45-day hold pursuant to Welfare and Institutions Code section 6601.3 exists when either the

inmate or parolee in revoked status is found to meet all the following criteria:

"(1) Some evidence that the person committed a sexually violent offense by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person on, before, or after January 1, 1996, which resulted in a conviction or a finding of not guilty by reason of insanity of one or more felony violations of the following Penal Code Sections: 261, 262, 264.1, 269, 286, 288, 288(a), 288.5, 289 or any felony violation of sections 207, 209 or 220, committed with the intent to commit a violation of sections 261, 262, 264.1, 286, 288, 288a, or 289. The preceding felony violations must be against one or more victims.

"If the victim of one of the felony violations listed above is a child under 14, then it is considered a sexually violent offense.

"A prior finding of not guilty by reason of insanity for an offense described in this subdivision, a conviction prior to July 1, 1977 for an offense described in this subdivision, a conviction resulting in a finding that the person was a mentally disordered sex offender, or a conviction in another state for an offense that includes all of the elements of an offense described in this subdivision, shall also be deemed to be a sexually violent offense, even if the offender did not receive a determinate sentence for that prior offense.

"(2) Some evidence that the person is likely to engage in sexually violent predatory criminal behavior."

Regulation 2600.1(d) draws from the statutory definition of a sexually violent predator in section 6600. As we have noted, subdivision (a)(1) of section 6600 defines a sexually violent predator as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) Subdivision (1) of regulation 2600.1(d) defines a sexually violent offense in substantially the same terms as subdivisions (a)(2) and (b) of section 6600. Subdivision (2) of regulation 2600.1(d) incorporates the requirement of subdivision (a)(1) of section 6600 that the person is likely to engage in sexually violent predatory criminal behavior. Thus, under the regulation, good cause to issue a 45-day hold exists when the board finds there is some evidence the person being evaluated (or to be evaluated) was convicted of a sexually violent offense and is likely to engage in sexually violent predatory criminal behavior.[3]

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[3] Regulation 2600.1(d) lacks the element of a diagnosed mental disorder that is part of section 6600. Thus, to issue a 45-day hold the board does not have to find some evidence that the person is likely to engage in sexually violent predatory criminal behavior because of a diagnosed mental disorder. Instead, it is sufficient for purposes of issuing the hold that

In response to the People's reliance on regulation 2600.1(d), Lucas contends: (1) the board "did not make a finding of cause, even as good cause is defined in [the regulation]," and (2) in any event the regulation is invalid because it is inconsistent with the underlying legislative purpose of the statutory good cause requirement.

We will explain in part III of our Discussion why we must presume the board did, in fact, rely on regulation 2600.1(d) in imposing the 45-day hold on Lucas. But for present purposes it is sufficient that we agree with Lucas on the latter point. A 45-day hold under section 6603.1 cannot be justified based on the definition of good cause contained in regulation 2600.1(d) because the regulation is inconsistent with the legislative intent behind the statutory good cause requirement.

In determining what is required for "a showing of good cause" under section 6601.3, "We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first, to the words of the statute, giving them their usual and ordinary meaning." (*People v. Flores* (2003) 30 Cal.4th 1059, 1063.)

Unfortunately, "What is 'good cause,' may be difficult to define with precision, since it must, in a great measure, be determined by reference to the particular circumstances

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there is evidence the person, *for whatever reason*, is likely to engage in sexually violent predatory criminal behavior.

appearing in each case." (*Ex Parte Bull* (1871) 42 Cal. 196, 199; see also *Bartlett Hayward Co. v. Indus. Acc. Com.* (1928) 203 Cal. 522, 532 ["What constitutes 'good cause' depends largely upon the circumstances of each case. The term is relative"].) Good cause is a "'flexible phrase[], capable of contraction and expansion, and by construction, all meaning can be compressed out of [it] or [it] may be expanded to cover almost any meaning. Reducing [it] to a fixed, definite and rigid standard, if desirable, is necessarily difficult, if not impossible.'" (*Cal. Portland Cement Co. v. Cal. Unemp. Ins. Appeals Board* (1960) 178 Cal.App.2d 263, 272.)

Nonetheless, case law provides some general principles that are of assistance in applying the term here. "'When related to the context of [a] statute, "good cause" takes on the hue of its surroundings, and it . . . must be construed in the light reflected by its text and objectives." (*Cal. Portland Cement Co. v. Cal. Unemp. Ins. Appeals Board*, *supra*, 178 Cal.App.2d at p. 273.) "'Good cause' must be so interpreted that the fundamental purpose of the legislation shall not be destroyed." (*Id.* at p. 272.) Moreover, "'in whatever context [it] appear[s], [good faith] connote[s], as [a] minimum requirement[], real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate excuses that will bear the test of reason, just grounds for action, and always the element of good faith.'" (*Id.* at pp. 272-273.)

As we have noted, regulation 2600.1(d) provides that there is good cause for a 45-day hold if there is some evidence the person being evaluated (or to be evaluated) was convicted of a sexually violent offense and is likely to engage in sexually violent predatory criminal behavior. As the People suggest, regulation 2600.1(d) essentially provides that there is good cause for a hold if there is some evidence the person may be a sexually violent predator. The People contend interpreting the term good cause in this manner "would effectuate the Legislature's stated purpose in enacting the [act]," which, in short, is to identify, confine, and treat sexually violent predators until they no longer pose a threat to society. (See Stats. 1995, ch. 763, § 1, pp. 5921-5922.)

In our view, however, accepting this definition of good cause would not fully effectuate the legislative intent behind the act and instead would actually thwart some of the Legislature's intent. In the act, the Legislature struck a careful balance between the public's interest in being protected from sexually violent predators on the one hand and the liberty interests of the inmates who are suspected of being sexually violent predators on the other. Accepting the definition of good cause in regulation 2600.1(d) as valid would upset this balance.

"The [act] was enacted to identify *incarcerated* individuals who suffer from mental disorders that predispose them to commit violent criminal sexual acts, and to confine and treat such individuals until it is determined they no longer present a

threat to society." (*People v. Allen* (2008) 44 Cal.4th 843, 857, italics added.) In support of the act, the Legislature found and declared that sexually violent predators "can be identified *while they are incarcerated*" and "it is in the interest of society to identify these individuals *prior to the expiration of their terms of imprisonment.*" (Stats. 1995, ch. 763, § 1, p. 5921, italics added.) Thus, the Legislature recognized it was in the public interest to identify inmates who are sexually violent predators *before* they are released from prison.

Balanced against this public interest, however, are the interests of the inmates in ending their imprisonment as soon as otherwise provided by law. "When a defendant is serving an indeterminate prison term, the Board is vested with power to rescind or postpone his or her parole date for cause. [Citations.] But under the determinate sentencing law, the Legislature has decreed that '[a]t the expiration of a term of imprisonment . . . imposed pursuant to [Penal Code] Section 1170 or at the expiration of a term reduced pursuant to [Penal Code] Section 2931, if applicable, the inmate shall be released on parole for a period not exceeding three years, unless the parole authority for good cause waives parole and discharges the inmate from custody of the department.' (Pen. Code, § 3000, subd. (b)(1).) Describing this language as 'a mandatory "kick-out" provision,' the Supreme Court has stated, 'The Board . . . has no discretion to grant or withhold parole to a prisoner who has served a determinate term.'" (*Terhune v. Superior Court*

(1998) 65 Cal.App.4th 864, 873-874.) Thus, when a parole release date has been set, the inmate has a legitimate liberty interest in actually being released from prison on that date.

Balancing the public interest in keeping sexually violent predators incarcerated with the private interests of inmates in being released from prison as soon as otherwise provided by law, the Legislature included provisions in the act aimed at ensuring prompt evaluation of potential sexually violent predators. Thus, the Legislature required that the referral for evaluation as a sexually violent predator -- including both preliminary screening and, if warranted, full evaluation -- generally must be made "at least six months prior to th[e] individual's scheduled date for release from prison." (§ 6601, subd. (a)(1).) Presumably, the Legislature concluded this six-month period would be sufficient for: (1) corrections and/or the board to conduct the preliminary screening; (2) mental health to conduct the full evaluation; (3) mental health to request the filing of a commitment petition; and (4) the district attorney or county counsel to file the petition. The Legislature apparently recognized, however, that that would not be the case every time. Thus, the Legislature enacted section 6601.3 to provide an additional 45 days, if necessary, to complete the process -- but only on a showing of good cause for the extension.

With this in mind, the question becomes whether authorizing an extension of custody whenever there is some reason to believe the person being evaluated (or to be evaluated) may be a

sexually violent predator is consistent with the intent behind the act. We think not.

As a general matter, an exception to a general rule that requires good cause as its trigger is just that -- an *exception* -- and should apply only in *exceptional* cases. (See *Ex Parte Bull*, *supra*, 42 Cal. at p. 199.) That an inmate being evaluated under the act as a potential sexually violent predator may be a sexually violent predator is hardly exceptional. As we have noted, the evaluation process is triggered only when the secretary of corrections determines an inmate "may be a sexually violent predator." (§ 6601, subd. (a)(1).) Presumably this determination is not made arbitrarily, but instead is based on some evidence. (See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 656-657 [suggesting that a decision that is not based on "some evidence" would be "without any basis in fact" and thus "arbitrary and capricious"].) Similarly, a full evaluation is warranted only if the preliminary screening results in a determination that "the person is likely to be a sexually violent predator." (§ 6601, subd. (b).) Again, presumably this determination is not made arbitrarily but is based on some evidence.

What that means is that by the time a person has been referred to mental health for a full evaluation, it has been determined already, based on some evidence, that the person not only may be, but is likely to be, a sexually violent predator. If the board legitimately could find good cause for a 45-day hold under section 6603.1 based solely on a showing of some

evidence that the person being evaluated (or to be evaluated) was convicted of a sexually violent offense and is likely to engage in sexually violent predatory criminal behavior -- as regulation 2600.1 permits -- then good cause for a hold would exist in *every* case referred for a full evaluation, and the exception would swallow the rule.

That the good cause exception in section 6601.3 was not intended to apply in every case referred for a full evaluation is supported by the legislative history of the amendment that added the good cause requirement to section 6603.1. (Stats. 2000, ch. 41, § 1, p. ___.) According to a committee analysis, the purpose of the amendment to section 6603.1 was to "clarif[y] that an inmate referred to the [sexually violent predator] process may be detained 45 days beyond the scheduled release date, in order to cover situations in which an inmate's release date may be unexpectedly moved up, or when a parole revocation term allows insufficient time to complete the evaluation process." (Assem. Com. on Appropriations, Analysis of Sen. Bill No. 451 (1999-2000 Reg. Sess.) Apr. 12, 2000, pp. 1-2, underlining omitted.) Thus, the Legislature recognized that exceptional circumstances might make it impossible to complete a sexually violent predator evaluation before the inmate's scheduled release date, despite the best efforts of corrections, mental health, and the board to complete the evaluation within that time. That is why a provision allowing a 45-day hold for good cause was necessary. But good cause does not exist unless there is something exceptional about the case -- something that

made it difficult or impossible to complete the evaluation within the normal time frame.

Because regulation 2600.1(d) purports to allow a finding of good cause for a 45-day hold based solely on evidence that the inmate may be a sexually violent predator, and does not require a showing of exceptional circumstances that precluded the completion of the sexually violent predator evaluation within the normal time frame, the regulation is invalid, as it is inconsistent with the legislative intent behind section 6603.1.

"We recognize that the courts usually give great weight to the interpretation of an enabling statute by officials charged with its administration, including their interpretation of the authority vested in them to implement and carry out its provisions. [Citation.] But regardless of the force of administrative construction, final responsibility for interpretation of the law rests with courts. If the court determines that a challenged administrative action was not authorized by or is inconsistent with acts of the Legislature, that action is void. [Citation.]

"These principles apply to the rulemaking power of an administrative agency, which is limited by the substantive provisions of the law governing that agency. [Citations.] To be valid, an administrative regulation must be within the scope of the authority conferred by the enabling statute or statutes. [Citations.] No matter how altruistic its motives, an administrative agency has no discretion to promulgate a

regulation that is inconsistent with the governing statutes." (*Terhune v. Superior Court, supra,* 65 Cal.App.4th at p. 873.)

Because the definition of good cause in regulation 2600.1(d) is inconsistent with the legislative intent behind section 6603.1, it cannot be used to justify the hold placed on Lucas. Furthermore, no excuse of any kind has been shown for why the evaluation of Lucas as a sexually violent predator could not have been completed in the normal time frame. The original screening form was completed on December 21, 2007 -- nearly 10 months before Lucas's parole release date. Nevertheless, it was not until October 1, 2008 -- a mere 11 days before Lucas's parole release date -- that the next step was taken, with the screening form being received by corrections's classification services unit. No reason for this delay has been shown. Accordingly, the showing of good cause required for a 45-day hold under section 6603.1 was never made, and the hold was unlawful.

III

Good Faith Mistake Of Law Under Section 6601(a)(2)

The People contend that "if [Lucas] was not in lawful custody, his custody was the result of a good faith mistake of law" and therefore under section 6601(a)(2) he is not entitled to relief. In essence, the People contend the board acted in good faith in placing a 45-day hold on Lucas based on regulation 2600.1(d).

As we will explain, we agree with the People that Lucas is not entitled to relief if the board imposed the 45-day hold

based on the regulation. We also conclude that because Lucas has not shown the board did *not* impose the hold based on the regulation, we must presume it did. Accordingly, Lucas is not entitled to habeas relief despite the unlawfulness of the hold.

We begin our discussion of this issue with *People v. Hubbart* (2001) 88 Cal.App.4th 1202. In *Hubbart*, the defendant was released from prison in 1993, but "[a]bout a month and a half after his release his parole was revoked for psychiatric treatment, pursuant to title 15, California Code of Regulations, section 2616, former subdivision (a)(7). The [sexually violent predator] petition was filed while he was in prison pursuant to that parole revocation, on January 2, 1996." (*Hubbart*, at pp. 1213-1214.)

In 1998, in *Terhune* an appellate court invalidated the regulation used to justify the revocation of Hubbart's parole. (*People v. Hubbart*, *supra*, 88 Cal.App.4th at p. 1227.) In 2000, Hubbart was committed as a sexually violent predator. (*Id.* at p. 1216.) On appeal from the order of commitment, in response to Hubbart's argument that his commitment was invalid because he was not in lawful custody at the time the commitment petition was filed, the appellate court noted that at the time his parole was revoked under the authority of the regulation later invalidated in *Terhune* "no judicial or administrative decision had addressed the validity of that regulation. . . . Thus, defendant has made no showing that his parole was revoked in bad faith." (*Hubbart*, at p. 1229.) The court later reiterated that "the error resulted from a mistake of law. . . . Corrections

relied on a regulation that was apparently valid: at the time, there was no controlling judicial decision directly on point. The regulation was invalidated only after the petition for commitment was filed. There is no evidence of any negligence or intentional wrongdoing here." (*Ibid.*)

Under *Hubbart*, then, the reliance of corrections on an apparently valid regulation that is only later determined to be invalid constitutes a good faith mistake of law. And subdivision (a)(2) of section 6601 precludes the dismissal of a sexually violent predator petition based on a claim of unlawful custody if the unlawful custody resulted from a good faith mistake of law.

Lucas contends his case is distinguishable from *Hubbart* because in his case "negligence on the part of [corrections] is precisely what caused the problem. The hearing officer, on October 9, 2008, had only two options. Impose the 45-day hold -- whether there was a legal basis to do so or not -- or simply allow the clock to run out and allow [Lucas] to be released. [¶] There is no evidence that 'good cause,' either under section 6601.3 or [regulation] 2600.1 played any part in that decision."

We disagree with Lucas's analysis. The determination of whether Lucas's unlawful custody resulted from a good faith mistake of law does not depend on whether corrections was negligent in waiting until only 11 days before his parole release date to follow up on the initial screening form completed almost 10 months earlier. Whether corrections was

negligent in that regard is pertinent only to whether there was good cause for placing the 45-day hold, as we have interpreted that term. We have concluded already that no good cause was shown.

In determining whether Lucas's unlawful custody resulted from a good faith mistake of law, two questions are pertinent: first, did the board rely on regulation 2600.1(d) in placing the 45-day hold on Lucas, and second, could the board reasonably have relied on the regulation in placing the hold. If the answer to both questions is "yes," then Lucas's unlawful custody was the result of a good faith mistake of law.

We begin with the second question. When the board placed the 45-day hold on Lucas in October 2008, there was no judicial or administrative decision that had addressed the validity of regulation 2600.1(d), and the regulation was, to all appearances, valid. Thus, the board could have relied in good faith on that regulation in placing the hold on Lucas.

That brings us to the other question -- namely, *did* the board rely on the regulation in placing the hold? Lucas contends there is no evidence the board relied on the regulation. He notes that the form used to place the hold contains no "reason or explanation for the hold" other than a statement that the hold was being placed to facilitate a full sexually violent predator evaluation by mental health. He further notes that "[t]he decision form does not contain a finding of good cause. Good cause is not even mentioned. [Regulation 2600.1(d)] is not even mentioned."

Just because the board did not *say* it was relying on regulation 2600.1(d), however, does not mean the board was *not* relying on the regulation. Furthermore, in a habeas corpus proceeding, the petitioner bears the burden of proving by a preponderance of the evidence the facts that establish a basis for relief. (*In re Cox* (2003) 30 Cal.4th 974, 997-998.) Here, that means Lucas must show by a preponderance of the evidence that the board was *not* relying on regulation 2600.1(d) when it placed the 45-day hold on him. Lucas has not made that showing.

Lucas contends the board did not rely on regulation 2600.1(d) in placing the hold because while "[t]he documents leading up to October 9, 2008" -- the day the hold was placed -- "clearly contain evidence that [he] had previously committed a sexually violent offense, or offenses, as required by [the regulation]," "[t]hey contain no evidence regarding the likelihood of his engaging in sexually violent predatory criminal behavior in the future, as [also] required by [the regulation]." Lucas admits that such evidence *does* appear "in the Level II Screen . . . , which was conducted October 9, 2008, the same day the Board . . . imposed the 45-day hold," because "[t]he Level II Screen contains the first assessment of [his] mental status, the first actuarial risk assessment, and the first consideration of additional risk factors." He also admits "it is possible the [board] hearing officer had the results of the Level II Screen available to him at the time he imposed the 45-day hold." He contends, however, that "the documents suggest otherwise" because "[t]he decision form states that [he] 'meets

the *initial* screening criteria,'" which in Lucas's estimation "appears to mean the 'first level criteria' referred to in the documents dated October 2 and 7 . . . , rather than the Level II Screen conducted the day the hold was placed."

In essence, Lucas asks us to infer that when the board, on October 9, 2008, placed the 45-day hold on him, it did not have before it any evidence that he was likely to engage in sexually violent predatory criminal behavior, even though such evidence was contained in the "Level II Screen" document completed that same day. And we should infer this, he contends, because the document placing the hold on him refers to him meeting "the *initial* screening criteria" as a sexually violent predator, which he takes to refer to criteria examined by corrections and the board before the "Level II Screen" was completed.

We are not persuaded that the reference to "the *initial* screening criteria" in the document placing the hold on Lucas demonstrates that the board was not in possession of the "Level II Screen" when it decided to place the hold. Consequently, Lucas's chain of inferences fails, and as a result he has not persuaded us that the board did not rely on regulation 2600.1(d) in placing the hold. Because Lucas has not met his burden of proving the contrary, we must conclude that the board did, in fact, rely in good faith on that regulation. As a result, subdivision (a)(2) of section 6601 bars us from granting Lucas any relief, despite our conclusion that no good cause was shown for his extended imprisonment under section 6603.1.

DISPOSITION

The order to show cause is discharged and the petition for writ of habeas corpus is denied.

ROBIE, J.

We concur:

HULL, Acting P. J.

BUTZ, J.

PROOF OF PERSONAL SERVICE VIA US MAIL

The undersigned deposes and says:

I am an employee of the Placer County Public Defender's Office; that I am over the age of 18 years and not a party to this cause, that my business address is 11760 Atwood Rd., Suite 4, Auburn, CA 95602.

That on April 12, 2010, I personally US mailed a true copy of

☐ Motion

☒ Petition – Petition for Review

☐ Other: _____

on the below named:

Supreme Court of California
Office of the Clerk, First Floor
305 McAllister Street
San Francisco, CA 94102

Clerk of the Court
Placer County Superior Court
P.O. Box 619072
Roseville, CA 95661-9072

Ms. Jennifer Poe
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Clerk of the Court
Court of Appeal, Third District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814-4719

California Dept of Corrections &
Rehabilitation
1515 S Street
Sacramento, CA 95811

Re: Client Name: **David Lucas**

Case Number: **Court of Appeal, Third District # C062809**
Placer County Case # SCV-23989

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

Executed on September 19, 2008, at Auburn, California.

Julie Hendricks
JULIE HENDRICKS