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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

COPY

THE PEOPLE, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent, CHRISTOPHER SHARKEY, Real Party in Interest.	S - _____ B219011 (Los Angeles County Super. Ct. No. ZM014203)

SUPREME COURT
FILED

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Deputy

PETITION FOR REVIEW

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PETITION FOR REVIEW

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

Real party in interest, Christopher Sharkey, hereinafter "real party," by and through his attorney Michael P. Judge, Public Defender of Los Angeles County, hereby respectfully petition this court for review following the published opinion of the California Court of Appeal, Second Appellate District, Division Three. A copy of the Court of Appeal's opinion, filed on March 25, 2010, is attached hereto as an Appendix.

FACTUAL AND PROCEDURAL HISTORY

On December 23, 2008, Steve Cooley, the District Attorney of Los Angeles County, hereinafter "petitioner," filed a petition alleging that real

party came within the purview of Welfare and Institutions Code[1/] sections 6600 et seq., The Sexually Violent Predator Act, hereinafter the "SVPA," because he was allegedly convicted of three sexually violent offenses. (Slip opn. at pp. 3, 6.)

On February 19, 2008, while in state prison and approximately nine months prior to his parole date, real party was screened by a California Department of Corrections and Rehabilitation, hereinafter "CDCR," correctional counselor who determined that real party "'meets the criteria as a potential SVP pursuant to' section 6600 et seq." (Slip Opn. at pp. 2-3.) The correctional counselor's determination was documented in a Sexually Violent Predator Screening form, hereinafter "CDC 7377," after "a thorough review of all cental file documentation." (Petition for Writ of Mandate, hereinafter "Petition," at p. 2.)

On March 12, 2008, CDCR referred real party's case to the Board of Parole Hearings, hereinafter "BPH," for further evaluation because real party meet the requirements for referral to the California Department of Mental Health, hereinafter "CDMH." (Slip Opn. at pp. 3-4.) "The referral packet included CDCR form 7377 with supporting documentation pertaining to the 1990 conviction, namely, a legal status summary, a staff recommendation

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[1/] All statutory reference are to the Welfare and Institutions Code, unless otherwise stated.

summary which contained information obtained on Sharkey by the correctional counselor, the probation officer's report, the abstract of judgment, chronological history of records by staff, the complaint and information in the criminal case, and a criminal history on Sharkey." (Slip Opn. at p. 4.) The CDC 7377 also documented the fact that real party's parole release date was November 24, 2008. (Pet., Exh. 5, CDC 7377, at p. 84; Pet., Corrected Reporter's Transcript of June 13, 2009, hereinafter "CRT," at p. 9.) The CDCR's referral process is complete when it determines the individual has a potential qualifying conviction and sends the CDC 7377 and supporting documentation to the BPH. (CRT, at pp. 14-15.) Sara Lopez, supervising Parole Agent III, assigned to the Sexually Violent Predator for Mental Health Disorders Offenders Unit at the BPH, testified that the BPH can make a referral to the CDMH with just the abstract of judgment for the alleged qualifying offense (CRT, at p. 18) and the BPH could have made the referral immediately to the CDMH. (Id., at pp. 18-19).

On March 17, 2008, real party's case was assigned to retired parole agent Richard Perry whose role was to confirm the qualifying conviction set forth in the CDC 7377. (Slip Opn. at p. 4; CRT, at p. 18.) Parole agent Perry was laid off in July, 2008. (Ibid.) Supervising parole agent Sara Lopez, testified that parole agent Perry submitted no reports on real party's case–i.e., produced no work product--and that on August 13, 2008, after three attempts

to rehire parole agent Perry she reassigned real party's case to parole agent Andrea Zahner. (CRT, at pp. 20, 24-25.) Parole agent Zahner "did not review the two 1990 convictions that had previously been identified. Rather, she sought information on the 1979 rape conviction. Although a single qualifying conviction sufficed under the SVPA, it was the Board's policy to provide as much information as possible to the CDMH for its review." (Slip Opn. at p. 4.)

On September 11, 2008, the BPH referred real party's case to the CDMH. (Slip Opn. at p. 4.) On September 19, 2008, Garret Essres, Ph.D., a licensed psychologist, performed a Level II screening to determine "'whether or not there is any chance of a diagnosis in the presented case. If there is no chance of diagnosis or the risk is too low the case is not sent on for further evaluation.'" (Id., at p.5.) Dr. Essres referred real party for further evaluation "because of the 'high actuarial risk, possible applicable diagnosis, predatory, untested in the community and high chronicity.'" (Ibid.)

On October 3, 2008, Dr. Karlsson and October 14, 2008, Dr. Koetting interviewed real party. (Slip Opn. at p. 5.) On October 29, 2008, Dr. Karlsson submitted his final report in which he opined that real party met the criteria for prosecution under the SVPA. (Ibid.) On November 17, 2008, Dr. Koetting submitted his Clinical Evaluation Summary in which he opined that real party

met the criteria for prosecution under the SVPA. (Ibid.; Pet., Exh. 4, at pp. 66, 68.)

"On November 18, 2008, with only six days before Sharkey's scheduled release date" CDMH case worker Elizabeth Mard requested a 45-day extension to allow Dr. Koetting to completed his final report. (Slip Opn. at p. 5.) Ms. Mard had no recollection of whether she contacted Dr. Koetting or whether he contacted her. (Pet., Exh. 7, at p. 108.) Ms. Mard has no fax or record of the communication. (Ibid.) Furthermore, Ms. Mard has no e-mail, fax, or record of her request for the 45-day extension to the BPH on November 19, 2008, or that she forwarded the Level II screening to the BPH. (Ibid.)

On November 20, 2008, Deputy Commissioner Marita Williams, granted the 45-day hold pursuant to section 6601.3 "'to facilitate full SVP evaluations to be concluded by the" CDMH effective from November 24, 2008, to January 8, 2009. (Slip Opn. at p. 5; Pet., Exh. 4, p. 60; Pet., Exh. 5, at p. 83.) Ms. Mard's file note reflected that Dr. Koetting needed more time to complete his report as the case was complex but she cannot recall if she actually offered those facts to Deputy Commissioner Williams as the basis for the extension. (Pet., Exh. 1, at p. 6.) Deputy Commissioner Williams stated in her declaration that it is her custom and practice to review a CDMH Level II screening document to insure the inmate meets the initial screening criteria

for SVP screening but she was unable to produce real party's Level II screening. (Pet., Exh. 5, at p. 83.)

On December 2, 2008, Dr. Koetting completed his final report. (Slip Opn. at p. 5.) On December 10, 2008, the CDMH "recommended to the Los Angeles County District Attorney that it proceed with a civil commitment petition because Sharkey met the statutory criteria for commitment under the SVPA." (Ibid.)

On January 13, 2009, real party "filed a motion to dismiss the SVP petition on the ground that he had been in unlawful custody since November 24, 2008" contending "that there was no justification for the Board's imposition, on November 20, 2008, of a 45-day hold pursuant to section 6601.3." (Slip Opn. at p. 6.) "The proffered justification for the 45-day extension was "'to facilitate full SVP evaluations to be concluded by the CDMH, but no explanation was given for the failure to complete the evaluations by November 24, 2008." (Ibid.) Real party contended that the delay was attributable to negligence on the part of the BPH, CDCR, and CDMH in failing to process real party's case so that full SVP evaluations would be completed before real party's November 24, 2008, parole date. (Pet., Exh. 3, at pp. 15-20.)

On January 14, 2009, petitioner "filed a response to the dismissal motion, arguing that the CDCR, the CDMH and the Board all acted with reasonable dispatch." (Slip Opn. at p. 6.)

"On June 15, 2009, the trial court conducting an evidentiary hearing on the dismissal motion and took the matter under submission. On July 24, 2009, the trial court granted Sharkey's motion to dismiss the People's petition to commit him as an SVP on the ground there was no good cause to justify the 45-day hold to facilitate full SVP evaluations by the CDMH" (Slip Opn. at p.8.) The trial court found California Code of Regulations Section 2600.1, subdivision (d), to be a "tautology–a statement true by its own definition and therefore fundamentally uninformative. The extension ruling simply states the purpose of the extension; it does not state the justification for why the evaluation could not have been timely completed." (Pet., Exh. 1, at p. 6.) The lower court elaborated on its ruling as follows:

> "'Under the definition of good cause in section [2600.1] of the regulations, there is good cause. There was 'some evidence' that Mr. Sharkey met both parts of the criteria listed in section [2600]-a qualifying offense and a [likelihood] of engaging in sexually violent predatory behavior, the latter satisfied by Dr. Karlsson's October 10, 2008 Clinical Evaluation Summary and his October 29, 2008 written report.
>
> "However, the court finds that the good cause definition set out in section [2600.1] of the CCR is clearly erroneous. It is not a definition of good cause-a reason why more time is needed. It simply declares that if the state of the underlying evidence is satisfactory under the 'some evidence' standard, the

> deadline is not enforced.' Merely 'because 'some evidence' exists that an inmate meets the criteria as a SVP cannot establish good cause to meet the filing deadline.'" (Slip Opn. at p. 8.)

On September 22, 2009, petitioner filed a Petition for Writ of Mandate in the Court of Appeal, Second Appellate District, Division Three, case number B219011.

On March 25, 2010, in a published decision the Court of Appeal reversed the trial court's ruling holding that California Code of Regulations Section 2600.1, subdivision (d)'s, definition of "good cause is "proper" and its "standard for good cause was met in this case–there was some evidence before the Board that Sharkey had committed a qualifying offense and some evidence that he is likely to engage in sexually violent predatory criminal behavior." (Slip Opn. at pp. 2-3.) Alternatively, the Court of Appeal ruled that section 6601, subdivision (a)(2)'s, provision 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" would have permitted the petitioner and the Board to rely on the regulation so as to preclude a dismissal of the petition. (Id., at pp. 16-17.)

These facts raise the following important issues on review.

ISSUES ON REVIEW

1. What is the constitutes "good cause" for the imposition of a 45-day hold under section 6601.3?

2. Is California Code of Regulations Section 2600.1's, hereinafter "Regulation 2600.1," implementation of section 6601.3's "good cause" requirement proper?

3. Does section 6601, subdivision (a)(2)'s, "good faith mistake of law or fact" exception preclude the dismissal of a SVPA petition which was not timely filed either: a) due to an erroneous interpretation of Regulations 2600.1's requirements, b) due to an erroneous reliance on Regulation 2600.1, subdivision (d)'s, definition of "good cause," or c) because the record is devoid of evidence warranting a finding of a "good faith mistake of law or fact"?

IMPORTANCE OF ISSUES ON REVIEW

Review is necessary to secure uniformity of decision and to settle an important questions of law. (Ca. Rules of Court, Rule 8.500, subd. (b)(1).)

The decision in the instant case is contrary to the decision reached in In re Lucas (2010) 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871 (Pet. Rev. Filed Apr. 13, 2010, Case No. S181788). In direct contrast to the holding in the instant case, the Court of Appeal, Third District, held in Lucas that "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." (Id., at 105 Cal.Rptr.3d 873-874.) Additionally, the Lucas court held that because 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." (Id., at 105, Cal.Rptr.3d 883.)

The definition of "good cause" required to impose a 45-day hold pursuant to section 6601.3 also presents important questions of law. Section 6601.3 does not define it usage of the term "good cause." (Slip Opn. at p. 12.) "'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 appearing in each case.'" (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 878.) The court of appeal's definition of "good cause" in the above-entitled case–i.e., that there is some evidence before the Board that an inmate has committed a qualifying offense and some evidence that he is likely to engage in sexually violent predatory criminal behavior– is legally incorrect based on two reasons. First, the Sharkey court erroneously construed Regulation 2600.1, subdivision (d), in a vacuum because it failed to take

account of the language and requirements of the regulation on a whole. Specifically, Regulation 2600.1, subdivisions (a) and (b), requires the establishment of a 3-day hold predicated on "exceptional circumstances" prior to the establishment of a 45-day hold. Although the Lucas court reached the correct conclusion that Regulation 2600.1, subdivision (d), as applied was invalid, it also failed to correctly analyze the overall language of the regulation. (See Argument II, post.) Second, the Sharkey court failed to correctly interpret section 6601.3 and its implementation by Regulation 2600.1. The legislative intent behind section 6601.3 was not to grant 45-day holds in cases where an inmate meet several of the SVPA criteria, rather it was enacted to cover situations where "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." (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 881; See Argument III, post.)

Additional important questions of law presented by the above-entitled case are: 1) whether a misconstruction and/or misapplication of Regulation 2600.1, subdivision (d), by the Board, BPH, CDCR, and/or CDMH can be excused pursuant to section 6601, subdivision (a)(2)'s, good faith mistake of act or law exception, and 2) whether negligence by the Board, BPH, CDCR,

and/or CDMH can be excused pursuant to section 6601, subdivision (a)(2)'s, good faith mistake of act or law exception. (See Arguments IV and V, post.)

Therefore, to secure uniformity of decisions and because the Court of Appeal decision in the above-entitled case misapplied and erroneously upheld Regulation 2600.1, subdivision (d)'s, interpretation of section 6601.3's "good cause" requirement and misapplied section 6601, subdivision (a)(2)'s good faith mistake of law or fact exception, this court should grant review.

THE STATUTORY SCHEME

The SVPA, effective January 1, 1996, provides for an indefinite commitments in a secure facility located on the grounds of an institution under the jurisdiction of the Department of Corrections upon a finding that a person is a "'sexually violent predator' [which] means 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); 6604.)

Section 6601 sets forth the pre-petition evaluation process and procedures in SVPA cases. The Department of Corrections and Rehabilitation screens inmates in its custody who are "serving a determinate prison sentence or whose parole has been revoked" at least six months before their scheduled date of release from prison to determine whether they "may be a sexually

violent predator." (§ 6601, subd. (a).) "If as a result of this screening it is determined the person is likely to be a sexually violent predator," that person is referred to the Department of Mental Health for a full evaluation. (§ 6601, subd. (b).) The evaluation process is to commence at least six months prior to the scheduled parole date in order to allow the completion of the evaluation prior to that date, however, "upon a showing of good cause, the Board of Prison Terms may order that a person referred to the State Department or 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.) The full evaluation is to be performed by two practicing psychiatrists or psychologists. (§ 6601, subd. (d).) If both evaluators concur that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director of the Department of Mental Health shall forward a request for a commitment petition to the county where the person was convicted of the crime for which he is currently imprisoned. (§ 6601, subds. (d), (h)-(I).) If the county's designated legal counsel agrees with the request, he or she shall file a petition for commitment in superior court. (§ 6601, subd. (I).)

ARGUMENT

I

STANDARD OF REVIEW

The instant case presents mixed question of law and fact–i.e., the facts underlying the finding of good cause and whether the lower court applied the correct legal standard in its determination of "good cause" based upon those facts. Mixed questions of law and fact are "subject to a substantial evidence standard of review as to factual findings and de novo review as to 'the court's applying the facts to the incorrect legal standards.'" (In re Adoption of Allison C. (2008) 164 Cal.App.4th 1004, 1010, Fn.6; e.g., People v. Sardinas (2009) 170 Cal.App.4th 488,493-494, "We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.")

The trial court conducted an evidentiary hearing on June 15, 2009, wherein it received into evidence numerous exhibits, including three declarations and testimony from supervising parole agent Sara Lopez via video

conference.[2/] (Pet., Exh. 1, at p. 1.) Based on the foregoing exhibits, declarations, and testimony the trial court issued detailed finding of facts surrounding the CDCR, BPH, and CDMH's evaluation in real party's case. (Pet., Exh. 1, at pp. 3-7.) These finding of facts formed the basis of the trial court's ruling that "good cause" justifying the 45-day hold pursuant to section 6601.3 was not present.

II

REGULATION 2600.1 REQUIRES "EXCEPTIONAL CIRCUMSTANCES" AND "GOOD CAUSE" BEFORE A 3-DAY, AND IN TURN A 45-DAY, HOLD MAY BE IMPOSED

Both the Sharkey and Lucas courts misconstrued the requirements of Regulation 2600.1 because their analysis was confined to subdivision (d) without consideration of the regulation as a whole. Regulation 2600.1 in relevant part provides:

> (a) Upon notification from the Division of Adult Institutions, Department of Mental Health, or Board of Parole Hearings (board) staff that either an inmate or parolee in revoked status may or does require a full evaluation pursuant to subdivisions (c) through (I) inclusive of Welfare and Institutions Code section 6601 to determine whether that person may be subject to commitment as a sexually violent predator, the board may order imposition of a temporary hold on the person for up to three (3) working days beyond their scheduled release date pending a good cause determination by the board pursuant to section 6601.3 of

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[2/] Evidence included real party's exhibits A, B, G, I, K, P, L, M, N, O, P, and J and the exhibits attached to Petitioner's responsive pleadings filed May 13, 2009, and June 13, 2009. (Pet., Exh. 1, at p. 1; Opp. To Pet. For Writ of Mandate and Prohibition and Req. For Stay.)

the Welfare and Institutions Code where exceptional circumstances preclude an earlier evaluation by the person pursuant to section 6601 of the Welfare and Institutions Code.

(b) Staff shall document that either inmates or parolees in revoked status subject to the temporary hold in subdivision (a) of this section either have been screened or are in the process of being screened as a person likely to be a sexually violent predator pursuant to Welfare and Institutions Code section 6601(b). The good cause determination by the board pursuant to subdivisions (c) and (d) of this section must occur within the time period of the temporary hold.

(c) Board determinations pursuant to Welfare and Institutions Code section 6601.3 shall be conducted by one commissioner or one deputy commissioner.

(d) For purposes of this section, good 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.[3/] The preceding felony violations must be against one or more victims.[4/]

. . . .

(2) Some evidence that the person is likely to engage in sexually violent predatory criminal behavior.[5/] (Emphasis and Footnotes Added.)

Both the Court of Appeal in the above-entitled case and in Lucas analyzed Regulation 2600.1, subdivision (d), in isolation–i.e., without reference to subdivisions (a) and (b). Regulation 2600.1 must be read as a whole. (City of Huntington Beach v. Board of Administration (1992) 4 Cal.4th 462, 468, "legislation must be construed as a whole while avoiding an interpretation which renders any of its language surplusage."; Arnett v. Dal Cielo (1996) 14 Cal.4th 4, 22, "[c]ourts should give meaning to every word of

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[3/] Cf. Section 6600, subdivision (b), defines a "sexually violent offense" as an act committed "by force, violence, duress, menace, 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, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code."

[4/] Cf. Section 6600, subdivision (a), in relevant part requires "a sexually violent offense against one or more victims."

[5/] Cf. Section 6600, subdivision (a)(3), in relevant part requires "[t]he details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence. . . ."

a statute if possible, and should avoid a construction making any word surplusage.)

Before a 45-day hold may be imposed pursuant to Regulation 2600.1, subdivision (d), the Board must first comply with subdivision (a)'s 3-day hold requirement. By its express terms, Regulation 2600.1, subdivision (a), requires a determination of "exceptional circumstances [which] preclude an earlier evaluation by the person pursuant to 6601 of the Welfare and Institutions Code" in order to impose a temporary or 3-day hold. Section 2600.1, subdivision (b), expressly states that "[t]he good cause determination by the board pursuant to subdivisions (c) and (d) of this section must occur within the time period of the temporary hold"–i.e., the 3-day hold. Regulation 2600.1, subdivision (d), is the subdivision authorizing a 45-day hold for good cause. In other words in order to obtain a 3-day hold, which is a prerequisite to obtaining a 45-day hold, there must be a showing of "exceptional circumstances" why an earlier evaluation was precluded. It would constitute an absurd result if the imposition of a 3-day hold required a finding of "exceptional circumstances" while the imposition of a 45-day hold did not. (People v. Coronado (1995) 12 Cal.4th 145, 151, "'We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose

of the statute, and avoid an interpretation that would lead to absurd consequences.'")

Indeed, the Lucas court ruled that "good cause does not exist unless there is something exceptional about the case-something that made it different or impossible to complete the evaluation withing the normal time frame." (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 881.) The definition of "exceptional circumstances" was discussed in People v. Escarcega (1986) 186 Cal.App.3d 379, 387, "'[t]he term 'exceptional circumstance' has not been expressly defined." At a minimum, however, the definition of that term envisions an unforeseeable, unique, or nonrecurring event or situation.'" (Citations omitted; Also see California Rules of Court, Rule 8.63, subdivision (b), relating to the determination of "good cause–or an exceptional showing of good cause" vis-a-vis applications for extensions of time wherein eleven specific considerations are set forth.)

Arguendo, even if the definition of "good cause" embodied in Regulation 2600.1, subdivision (d), merely requires a finding that "there was some evidence before the Board that Sharkey had committed a qualifying offense and some evidence that he is likely to engage in sexually violent predatory criminal behavior" (Slip Opn. at pp. 2-3), such finding must have been preceded by a finding of "exceptional circumstances" as required by subdivision (a), which was totally devoid in the above-entitled case. (In re

Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 873-874 "the definition of good cause contained in subdivision (d). . . is inconsistent with the legislative intent behind the statutory [section 6601.3] good cause requirement.")

Therefore, a correct interpretation of Regulation 2600.1 requires the imposition of a 3-day hold and a finding of "exceptional circumstances" in addition to a finding of "good cause" before a 45-day hold may be imposed.

III

THERE WAS NO "GOOD CAUSE" JUSTIFYING THE IMPOSITION OF A 45-DAY HOLD UNDER SECTION 6601.3

Arguendo, should Regulation 2600.1, subdivision (d), be read so as not to include the requirement that its application be proceeded by a 3-day hold with its concomitant finding of "exceptional circumstances" prior to the imposition of a 45-day hold as required by subdivisions (a) and (b) (see Argument II, ante), facts constituting "good cause" under subdivision (d) were lacking. Section 6601.3 permits an individual to be held for up to 45 days beyond his or her scheduled release date for a full evaluation upon a showing of "good cause." The burden is on the petitioner to demonstrate the presence of "good cause." (Evid. Code § 500, "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.") After

applying the correct legal standard for "good cause," the trial court properly ruled that there was inadequate showing of "good cause" to justify the 45-day hold in the above-entitled case. (Pet., Exh. 1.)

The express legislative purpose for the enactment of section 6601.3's 45-day hold is "'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.)" (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 881-882.) The factual scenarios underlying section 6601.3's express legislative purpose are absent in the above-entitled case–i.e., a parole date not unexpectedly moved up nor was real party in custody based on a parole revocation which allowed insufficient time to complete the evaluation process. Significantly, the evaluation in the above-entitled case was commenced approximately nine months prior the real party's parole date which allowed adequate time for a full evaluation. Therefore, any hold in the above-entitled case would have been unlawful because it did not fall within the ambit of section 6601.3.

Regulation 2600.1, subdivision (d), purports to define section 6601.3's "good cause" standard by utilizing section 6600's, statutory language, almost verbatim. (See Argument II, text of Regulation 2600.1, subd. (d) and section

6600, subdivision (4)(b), ante.) "[R]ules and regulations. . . must be reasonable, since parolees retain constitutional protection against arbitrary and oppressive official action." (Terhune v. Superior Court (1998) 65 Cal.App.4th 864, 874.) As the facts readily demonstrate, there were no "exceptional circumstances [which] prelude[d] an earlier evaluation" in the above-entitled case. Negligent conduct by the BPH and the CDMH caused the delay.

Regulation 2600.1, subdivision (d)'s, definition of "good cause" when viewed in isolation–i.e., without reference to subdivision (a) and (b)--is vague, inconsistent with section 6601.3's intent, and is of "little worth." (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 881, "'[n]o matter how altruistic its motives, an administrative agency has no discretion to promulgate a regulation that is inconsistent with the governing statutes.'") Subdivision (d) merely recites, substantially verbatim, section 6600's statutory language without any attempt to set forth guidelines for the application of this language. In the words of trial court, "the court finds that the good cause definition set out in section 2600 of the CCR is clearly erroneous. It is not a definition of good cause-a reason why more time is needed." (Pet., Exh. 1, p. 7.) Good cause must take account "'as minimum requirements, real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results adequate excuse that will bear the test of reason, just grounds for action, and always the element of good faith.'" (California

Portland Cement Co. v. Cal. Unemployment Insurance App. Board (1960) 178 Cal.App.2d 263, 272-73; Amaro v. UIAB (1977) 65 Cal.App.3d 715, 719 n.1; In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 881, "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.")

The Court of Appeal in the above-entitled case erroneously ruled that Regulation 2600.1, subdivision (d), is valid. (Slip Opn. at p. 16.) The Court of Appeal also erroneously ruled that "the regulations criteria for imposition of a 45-day hold were clearly satisfied," the criteria being that "there was some evidence before the Board of a qualifying offense and some evidence that Sharkey was likely to engage in sexually violent predatory behavior." (Ibid.) In reaching the opposite result, the Lucas court held "[b]ecause 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 6601.3." (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 881.) The Lucas court continued "[b]ecause the definition of good cause in regulation 2600.1(d) is inconsistent with the legislative intent

behind section 6601.3, it cannot be used to justify the hold placed on Lucas." (Ibid.)

The trial court observed, by analogy, that Penal Code section 1050 requires "good cause" before a criminal trial can be continued beyond the statutory time limits. (Pet., Exh. 1, at p. 7.) "Good cause in that context is not established by showing that probable cause exists defendant committed the charged crime. . ." and it "does not release the parties from having to give a good reason why they cannot meet the statutory deadline." (Ibid.) "Similarly, because 'some evidence' exists that an inmate meets the criteria as a SVP cannot establish good cause to meet the filing deadline. The motion that a filing deadline is excused and an inmate's deprivation of liberty is extended because he may qualify by 'some evidence' eviscerates the concept of good cause. Thus, the court cannot defer to the administrative regulation's definition of 'good cause.' It does not adhere to established notions of good cause in any legal contest." (Ibid.)

The trial court's observation of identical terminology–i.e., "good cause"–utilized by the Penal Code is not without precedence. The SVPA accords individuals subject to commitment most of the rights commensurate with criminal proceedings. Section 6602 provides for probable cause hearings which this Court analogized to criminal preliminary hearings (Cooley v. Superior Court (Marentez) (2003) 29 Cal.4th 228), section 6603 provides for

the right to counsel, the right to expert assistance, the right to discovery, trial by jury, and the right to a unanimous verdict, and section 6604 provides that the prosecution's burden of proof is beyond a reasonable doubt. Section 6602, subdivision (a), requires "probable cause" but fails to specifically define the meaning of "probable cause." (Cooley v. Superior Court (Marentez), supra, 29 Cal.4th 228, 251.) In defining the legislative use of the term "probable cause" under the SVPA, this Court looked to the usage of the term in the criminal law, which it ultimately adopted. (Id., at p. 247, "For this reason, based on the structure of the SVPA, a section 6602 hearing is analogous to a preliminary hearing in a criminal case. . . .", also see, p. 251, "We assume, therefore, that the Legislature, by using the term 'probable cause' in section 6602, subdivision (a), intended an analogous definition and application of this term in the context of this civil commitment scheme.")

Therefore, the trial court's ruling that the 45-day hold imposed by Deputy Commissioner Williams on behalf of the BPH was without "good cause" and therefore, unlawful and the court of appeal's ruling to the contrary is erroneous.

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IV

UNLAWFUL CUSTODY IS NOT ATTRIBUTABLE TO A "GOOD FAITH MISTAKE OF FACT OR LAW" UNDER SECTION 6601, SUBDIVISION (a)(2)

Both the Sharkey and Lucas courts erroneously ruled that section 6601, subdivision (a)(2), precludes dismissal notwithstanding a finding that Regulation 2600.1 is invalid. (Slip Opn. at p. 17, "[a]lthough the trial court believed the subject regulation is invalid, the trial court should have recognized that absent a judicial determination of invalidity, the Board and the People were entitled to rely on the regulation, so as to preclude a dismissal of the petition. (§ 6601, subd. (a)(2).)"; In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 882-883, "[i]n 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.")

Section 6601, subdivision (a)(2), 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. This paragraph shall apply to any petition filed on or after January 1, 1996." The burden of showing "a good

faith mistake of fact or law" as required by section 6601, subdivision (a)(2), is on Petitioner. (People v. Superior Court (Small) (2008) 159 Cal.App.4th 301, 304, "the People failed to show that its delay in filing the petition resulted from a good faith mistake of fact or law (§ 6601, subd. (a)(2).")

The analysis of section 6601, subdivision (a)(2), in the above-entitled case and in Lucas was erroneous based upon the following three alternative arguments. First, the facts in the above-entitled case not only demonstrate a complete lack of "exceptional circumstances" and "good cause, they also demonstrate that the Board failed to follow Regulation 2600.1–i.e., it granted the 45-day hold based on subdivision (d) without first complying with the requirements of subdivision (a) and (b) concerning the initial implementation of a 3-day hold which requires a finding of "exceptional circumstances." (See discussion, Argument II, ante.) The Lucas court set forth a two part test for determining whether unlawful custody results from a good faith mistake of law: 1) did the Board rely on the regulation, and 2) could the Board reasonably have relied on the regulation in placing the hold. (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 882-883.) A correct application of this test leads to the conclusion that there was no good faith mistake of law because the unlawful custody resulted from the Board's failure to correctly follow Regulation 2600.1. subdivisions (a) through (d), versus subdivision (b) being subsequently invalidated by judicial or administrative decision. Had the Board

correctly applied Regulation 2600.1 as written, a hold would not have been imposed given the complete lack of "exceptional circumstances." Therefore, the Board could not have reasonably relied on the regulation because it did not follow its mandate.

Second and alternatively, there was no reasonable grounds for the deputy commissioner's reliance on Regulation 2600.1, subdivision (d), because its definition of "good cause" was so "facially deficient" that no commissioner could not reasonably presume it to be valid. (Cf. United States v. Leon (1984) 468 U.S. 897 [104 S.Ct. 3405, 82 L.Ed.2d 677]; People v. Willis (2002) 28 Cal.4th 22, "evidence obtained pursuant to a search warrant that is not supported by probable cause must be suppressed 'where an officer's reliance on a search warrant was not 'objectively reasonable,' i.e., the officer had 'no reasonable grounds for believing that the warrant was properly issued.' [Citation.].") Significantly, the appointment, qualifications, and training of Board of Parole Hearing commissioners and deputy commissioners are regulated by statute. (Pen. Code §§ 5075 et seq.; Govt. Code § 12838.4) Commissioners and deputy commissioners must be held to a minimum, if not a higher, standard. These judicial or quasi-judicial officers should reasonably have been able to interpret and apply Regulation 2600.1 accurately and should have known that reliance on subdivision (d) alone created a "facially deficient" and invalid standard of "good cause" notwithstanding the fact that there had

been no prior judicial or administrative decision addressing the validity of Regulation 2600.1. This is preciously what the trial court in the above-entitled case found: "the court finds that because the regulation eviscerates the common legal definition of good cause, it could not be reasonably relied upon under these circumstances." (Pet., Exh. I, p. 7.)

Third and alternatively, the Lucas' court analysis that "[t]he 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." is erroneous. (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 882.)

The foregoing rule announced in Lucas that administrative negligence only goes to the validity of the 45-day hold and not to whether there was a good faith mistake of law under section 6601, subdivision (a)(2), is novel and erroneous. As discussed infra, negligence is neither a mistake of law or fact, it's a failure to use ordinary care which is not dependent on the existence of a mistake. Additionally, negligence sufficient to defeat a finding of "good cause" is likewise sufficient to defeat an assertion of "good faith belief."

Negligence cannot be properly categorized as a good faith mistake of law. The five month delay by the BPH and subsequently delay by the CDMH in the above-entitled case were not due to any mistake of law. Quite simply, the agencies negligently failed to perform their statutorily mandated duties thus depriving real party of his liberty. (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 879, "when a parole release date has been set, the inmate has a legitimate liberty interest in actually being released from prison on that date.") Neither did such negligence constitute a mistake of fact. (Slip Opn. at p. 17; Pet., Exh. 1, at p.7, "[h]ere there was no good faith mistake of fact. Everyone knew what the operative dates were and the underlying facts that needed to be established to determine if Mr. Sharkey qualified under the statute.") Therefore, the agencies conduct falls outside the potential savings clause provided by section 6601, subdivision (a)(2), since real party's unlawful custody was not due to a mistake of law or fact. (See discussion Argument V, post.) Instead, real party's custody falls within the negligence or intentional wrongdoing by governmental officials' exclusion to section 6601, subdivision (a)(2), articulated in Hubbart, Whitley and Lyles. (People v. Hubbart (2001) 88 Cal.App.4th 1202, 1229, "[t]here was no evidence of any negligence or intentional wrongdoing here"; People v. Superior Court (Whitley) (1998) 68 Cal.App.4th 1383, 1390; Garcetti v. Superior Court (Lyles) (1998) 68 Cal.App.4th 1105, 1118, the revocation of parole "was without any hint of

negligence or intentional wrongdoing by government officials.") Senate Bill 11 (Stats. 1999, ch. 136), § 3), states that section 6601, subdivision (a)(2), is declaratory of existing law of which Whitley's and Lyles's "negligence or intentional wrongdoing" language is a part. (Buckley v. Chadwick (1955) 45 Cal.2d 183, 200, the Legislature is presumed to have knowledge of existing judicial decisions and to have enacted and amended statutes in light of such decisions.)

The gravamen in the above-entitled case is not the failure to correctly apply and/or construe Regulation 2600.1, subdivision (d). It is based on the reality that there were no facts presented justifying a finding of good cause under section 6601.3 in the first place. Negligence was the exclusive cause for the delay. Because there were no facts justifying a finding of "exceptional circumstances" or "good cause," a hold pursuant to section 6601.3 and Regulation 2600.1 could never have been legitimately instituted. Negligence is not good cause, nor is it a good faith mistake of law or fact. It is the "failure to use a reasonably amount of care when such failure results in injury to another." (Webster's New World Dict. (college ed. 1968) p. 982); Black's Law Dict. (4th ed. 1968) p. 1184, "[t]he failure to exercise ordinary care".)

Once the trial court ruled that the 45-day hold was unlawful, it then proceeded to properly apply the "good faith mistake of fact or law" test set forth by section 6601, subdivision (a)(2), in light of its factual findings which

are supported by substantial evidence . (Slip Opn. at p. 17; Pet., Exh. 1, at p. 7.) Specifically, the trial court ruled: "Here there was no good faith mistake of fact. Everyone knew what the operative dates were and the underlying facts that needed to be established to determine if Mr. Sharkey qualified under the statute." (Slip Opn. at p. 17; Pet., Exh. 1, at p.7.) "As to good faith mistake of law, the could assume that Deputy Commissioner Williams in good faith believed she could extend the deadline to promote a full evaluation as long as she had 'some evidence' under section 2600. She never testified to this or any other fact of law she relied upon in rendering her decision. [¶] There is no evidence upon which the can infer the reasons behind Ms Williams's decision. Nevertheless, assuming she did rely on section 2600, the court finds that because the regulation eviscerates the common legal definition of good cause, it could not be reasonably relied upon under these circumstances. The People did not establish a mistake of either fact or law." (Pet., Exh. 1, at p.7)

The analysis of the presence of "good faith" in the above-entitled case is not dissimilar from that in People v. Superior Court (Small), supra, 159 Cal.App.4th 301. In Small the enactment of Jessica's Law in 2006 led to a massive growth in referrals for SVPA assessments which in turn caused the delay in conducting evaluations. The court ruled Small's unlawful custody was not the result of a good faith mistake of fact or law. (Id., at pp. 309-310, "The increased workload does not amount to a mistake of law or fact and is

something that the Department of Corrections and Mental Health could have anticipated and prepared for.") Just as CDCR's logistical and personnel problems did not satisfy section 6601, subdivision (a)(2)'s, "good faith" requirement in Small, the negligent logistical and personnel problems attributable to both the BPH and CDMH in the above-entitled case does not even come close to satisfying the requirement of "good faith." The BPH allowed real party's evaluation to languish for approximately five months because its parole agent did nothing on the case and the parole agent's supervisor failed to adequately supervise him and then waited three weeks to replace him once he was terminated. (See discussion ante.) Then the CDMH allowed one of its psychologists to unnecessarily prolong the completion of his report based on the conclusion that the case was "complex" notwithstanding the fact that he had already concluded in his Clinical Evaluation Summary that real party meet the SVPA criteria well before real party's parole date and despite the fact that the second evaluator completed his report approximately three weeks before real party's parole date. (See discussion ante.)

Therefore, the trial court's determination that "good faith mistake of law and fact" was lacking is correct and is supported by substantial evidence and the court of appeal's holding to the contrary is erroneous.

V

DISMISSAL IS THE APPROPRIATE REMEDY WHERE UNLAWFUL CUSTODY IS NOT THE RESULT OF A GOOD FAITH MISTAKE OF FACT OR LAW

A petition filed pursuant to the SVPA "'should be dismissed if the unlawful custody was not the result of a good faith mistake of fact or law.'" (People v. Superior Court (Small), supra, 159 Cal.App.4th 301, 304, 308-309.) The trial court ruled that real party's custody was unlawful because there was no "good cause" to justify the 45-day hold and that there was no "good faith mistake of fact or law" excusing the unlawful custody. Accordingly the lower court correctly ruled: "It is true that no consequences expressly attach. However, the statute explicitly states when dismissal shall not be authorized, i.e., if the delay is caused by a good faith mistake of fact or law. Having listed two excuses (or good cause) for avoiding dismissal, the Legislature could have added more. It did not. The court infers that absent those narrow, explicit excuses, dismissal is the appropriate remedy given, given the fact that the delay resulted in deprivation of liberty, a constitutional consideration." (Pet., Exh. 1, at p. 8.)

Section 6601, subdivision (a)(2)'s express language 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" implicitly, if not explicitly, requires the court to dismiss a SVPA petition if saving clause "the unlawful custody was the result of a good faith mistake of fact or law" is not satisfied. This statutory language is equivalent to a "negative pregnant." Section 6601, subdivision (a)(2), by specifically stating that a petition shall not be dismissed where the "custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law," while omitting any reference that dismissal is otherwise prohibited confirms the Legislature's intention to permit dismissals absent the limited circumstances specifically set forth by the statute itself. (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 876, "'[t]his 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, 116 Cal.Rptr.2d 336.)".) In the above-entitled case, the unlawful custody was attributable to negligence does not fall within the ambit of section 6601, subdivision (a)(2).

Therefore, the trial court's dismissal of the Petition was proper and supported by substantial evidence and the Court of Appeal's holding to the contrary is erroneous.

CONCLUSION

Real party is entitled to a proper resolution of the issues presented to the Court of Appeal, based upon application of correct legal principles to the record and arguments presented to the trial court. This court should grant review and provide that proper resolution.

Respectfully submitted,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA
Albert J. Menaster,
Karen King,
Jack T. Weedin,
Deputy Public Defenders

By: _____
Jack T. Weedin
Deputy Public Defender
(State Bar No. 73086)

Attorneys for Real Party in Interest

CERTIFICATE OF COMPLIANCE
PURSUANT TO CALIFORNIA RULES OF COURT,
RULE 8.504, SUBDIVISION (d)(1)

I certify that the attached petition for review contains 8,373 words according to the word count of the computer program used to prepare the document.

DATED: April 29, 2010.

Jack T. Weedin
Deputy Public Defender

APPENDIX

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; CHRISTOPHER SHARKEY, Real Party in Interest.	B219011 (Los Angeles County Super. Ct. No. ZM014203)

ORIGINAL PROCEEDINGS in mandate. Maria E. Stratton, Judge. Order to show cause is discharged; petition granted.

Steve Cooley, District Attorney, Irene Wakabayashi, Head Deputy, Shirley S.N. Sun, Deputy District Attorney for Petitioner.

No appearance for Respondent.

Michael P. Judge, Public Defender, Albert J. Menaster, Karen King and Jack T. Weedin, Deputy Public Defenders, for Real Party in Interest.

The People seek a writ of mandate directing respondent superior court to vacate its order dismissing a petition for commitment of Christopher Sharkey (Sharkey) as a sexually violent predator (SVP) and to enter a new order setting the matter for proceedings pursuant to the Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.).[1]

Four days before Sharkey's scheduled parole release date, because his evaluation as a potential SVP was not yet complete, the Board of Parole Hearings (Board) placed a 45-day hold pursuant to section 6601.3, to facilitate full SVP evaluations to be completed by the California Department of Mental Health (CDMH).

Section 6601.3 provides for a hold of up to 45 days for "good cause." Section 6601.3 does not specify what constitutes "good cause" for such a hold. However, California Code of Regulations, title 15, section 2600.1, subdivision (d), a regulation promulgated by the Board, supplies the definition. The regulation states: "For purposes of this section, good 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, . . . which resulted in a conviction or a finding of not guilty by reason of insanity . . . . [¶] . . . [¶] . . . (2) *Some evidence* that the person is likely to engage in sexually violent predatory criminal behavior." (Cal. Code Regs., tit. 15, § 2600.1, subd. (d), italics added.)

The essential issue before this court is the validity of the regulation's definition of good cause for imposition of a 45-day hold. We conclude the regulation's standard for good cause is proper.

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise specified.

Further, the regulation's standard for good cause was met in this case – there was some evidence before the Board that Sharkey had committed a qualifying offense and some evidence he is likely to engage in sexually violent predatory criminal behavior. Therefore, the Board had good cause to impose a 45-day hold. Accordingly, we grant the People's petition and direct the trial court to reinstate the SVPA commitment petition.

FACTUAL AND PROCEDURAL BACKGROUND

According to the petition to commit Sharkey as an SVP, in 1979 he was convicted of one count of rape by force (Pen. Code, § 261), and in 1990 he again was convicted of one count of rape by force and an additional count of assault with intent to commit rape (Pen. Code, § 220).

The 1990 conviction resulted in a 37-year prison sentence. Sharkey's scheduled parole release date was November 24, 2008.

1. *Sharkey's screening and evaluation as a potential SVP; Sharkey is referred to the Board for evaluation as a potential SVP.*

On February 19, 2008, about nine months before the scheduled release date, Sharkey was screened by a correctional counselor, who determined that Sharkey "meets criteria as a potential SVP pursuant to" section 6600 et seq.[2]

On March 12, 2008, after having determined that Sharkey met the requirements for referral to the CDMH as a potential SVP, the California Department of Corrections and Rehabilitation (CDCR) referred Sharkey's case to the Board for further evaluation as

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[2] Section 6601 states in relevant part: "(a)(1) Whenever the Secretary of the Department of Corrections and Rehabilitation determines that an individual who is in custody under the jurisdiction of the Department of Corrections and Rehabilitation, and who is either serving a determinate prison sentence or whose parole has been revoked, may be a sexually violent predator, the secretary shall, *at least six months prior to that individual's scheduled date for release from prison*, refer the person for evaluation in accordance with this section." (Italics added.)

an SVP, pursuant to section 6601, subdivision (b).[3] The referral packet included CDCR form 7377 with supporting documentation pertaining to the 1990 conviction, namely, a legal status summary, a staff recommendation summary which contained information obtained on Sharkey by the correctional counselor, the probation officer's report, the abstract of judgment, chronological history of records by staff, the complaint and information in the criminal case, and a criminal history on Sharkey.

On March 17, 2008, following the Board's receipt of Sharkey's packet, it was assigned to Richard Perry (Perry), a retired parole agent who was working part-time. Perry was assigned cases in which the release date was six to nine months away. Perry's role at that point was to confirm the qualifying convictions. In July 2008, Perry was laid off pursuant to a cost control directive.

On August 13, 2008, the Board reassigned Sharkey's case to parole agent Andrea Zahner (Zahner).

Zahner's file notes reflected that she did not review the two 1990 convictions that had previously been identified. Rather, she sought information on the 1979 rape conviction. Although a single qualifying conviction sufficed under the SVPA, it was the Board's policy to provide as much information as possible to the CDMH for its review.

On September 11, 2008, the Board notified the CDMH that the CDCR had determined that Sharkey "meets the first level sexually violent predator . . . criteria . . . and has referred the package to the Board," and that the Board's "[i]ndependent review of

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[3] Section 6601, subdivision (b) provides: "The person shall be screened by the Department of Corrections and Rehabilitation and the Board of Parole Hearings 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. This screening shall be conducted in accordance with a structured screening instrument developed and updated by the State Department of Mental Health in consultation with the Department of Corrections and Rehabilitation. If as a result of this screening it is determined that the person is likely to be a sexually violent predator, the Department of Corrections and Rehabilitation shall refer the person to the State Department of Mental Health for a full evaluation of whether the person meets the criteria in Section 6600."

the factors also indicates that this case meets the first level sexually violent predator criteria for referral to the [CDMH]," citing Sharkey's 1979 and 1990 convictions.

On September 16, 2008, Sharkey's files were uploaded by the CDMH. On September 19, 2008, Garret Essres, Ph.D., a licensed psychologist on the CDMH panel, performed a Level II screening of Sharkey's records to determine "whether or not there is any chance of a diagnosis in the presented case. If there is no chance of diagnosis or the risk is too low the case is not sent on for further evaluation." Dr. Essres referred Sharkey for further evaluation by the CDMH because of the "high actuarial risk, possible applicable diagnosis, predatory, untested in the community and high chronicity."

Sharkey was interviewed by Dr. Karlsson on October 3, 2008, and by Dr. Koetting on October 14, 2008. Dr. Karlsson submitted his report on October 29, 2008. Dr. Karlsson opined in his Clinical Evaluation Summary that Sharkey met the criteria for prosecution under the SVPA.

On November 18, 2008, with only six days remaining before Sharkey's scheduled release date and with Dr. Koetting's report not yet having been completed, Elizabeth Mard, a case worker with the CDMH, requested a 45-day extension of time from the Board in order to allow Dr. Koetting additional time to complete his report.

On November 20, 2008, the Board placed a 45-day hold effective November 24, 2008, pursuant to section 6601.3, "to facilitate full SVP evaluations to be concluded by the [CDMH]."

On December 2, 2008, Dr. Koetting submitted a 61-page evaluation of Sharkey. Dr. Koetting concurred with Dr. Karlsson that Sharkey met the criteria for prosecution under the SVPA.

On December 10, 2008, the CDMH recommended to the Los Angeles County District Attorney that it proceed with a civil commitment petition because Sharkey met the statutory criteria for commitment under the SVPA.

2. *SVPA proceedings.*

On December 23, 2008, the People filed a petition for commitment of Sharkey as an SVP.

On January 6, 2009, the trial court determined there was probable cause to believe Sharkey was likely to engage in sexually violent predatory criminal behavior upon his release and ordered Sharkey detained in a secure facility pending trial. (§ 6602.)

3. *Sharkey's motion to dismiss the SVP petition.*

On January 13, 2009, Sharkey filed a motion to dismiss the SVP petition on the ground he had been in unlawful custody since November 24, 2008. Sharkey contended there was no justification for the Board's imposition, on November 20, 2008, of a 45-day hold pursuant to section 6601.3. The proffered justification for the 45-day extension was "to facilitate full SVP evaluations to be concluded" by the CDMH, but no explanation was given for the failure to complete the evaluations by November 24, 2008.

On January 14, 2009, the People filed a response to the dismissal motion, arguing that the CDCR, the CDMH and the Board all acted with reasonable dispatch. The People argued: Sharkey's case was referred for screening by the CDCR at least six months before his scheduled parole release date; some delay stemmed from the layoff of the Board's original evaluator, difficulty in obtaining records of Sharkey's 1979 prior conviction and the complexity of Sharkey's case; good cause existed for imposing the 45-day hold; the fact Dr. Koetting needed additional time to complete his evaluation does not demonstrate a lack of diligence; Dr. Koetting interviewed Sharkey on October 14, 2008, notified the CDMH of his positive conclusion on November 17, 2008, and completed his written evaluation on December 2, 2008. The People asserted "This is not an unreasonable time period when looking at the more than sixty-six documents that had to be reviewed in [Sharkey's] file," as well as the 61-page evaluation that Dr. Koetting prepared.

Thereafter, the parties filed supplemental papers in the trial court with respect to the validity of the pertinent regulation, California Code of Regulations, title 15, section 2600.1, which defines "good cause" for purposes of imposing a 45-day hold pursuant to section 6601.3. The regulation provides: "(d) For purposes of this section, good 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 . . . which resulted in a conviction or a finding of not guilty by reason of insanity . . . [and] [¶] (2) *Some evidence* that the person is likely to engage in sexually violent predatory criminal behavior. (Cal. Code Regs., tit. 15, § 2600.1, subd. (d), italics added.)

Sharkey contended the regulation does not meet due process standards because it lacks any provision to determine whether the delay was justified and whether the CDMH and the Board exercised due diligence. Further, even assuming the regulation is valid, no good cause was shown when the Board extended his scheduled release date by 45 days to allow more time to determine whether Sharkey met the criteria for civil commitment as an SVP.

The People argued the 45-day extension was proper because there was *some evidence* that Sharkey committed a sexually violent offense and *some evidence* he was likely to engage in sexually violent predatory criminal behavior. (Cal. Code Regs., tit. 15, § 2600.1, subd. (d).) Further, the time limit in section 6601, subdivision (a), requiring the CDCR to refer the case for evaluation at least six months before the scheduled release date, is directory, not mandatory, and here, the agencies involved were diligent in processing Sharkey's case.

4. *Trial court's decision granting Sharkey's motion to dismiss the SVP petition, on the ground the Board lacked good cause to impose a 45-day hold.*

On June 15, 2009, the trial court conducting an evidentiary hearing on the dismissal motion and took the matter under submission. On July 24, 2009, the trial court granted Sharkey's motion to dismiss the People's petition to commit him as an SVP on the ground there was no good cause to justify the 45-day hold to facilitate full SVP evaluations by the CDMH, but stayed its ruling until September 22, 2009.

In a written ruling filed August 21, 2009, the trial court set forth its rationale as follows:

"Under the definition of good cause in section [2600.1] of the regulations, there is good cause. *There was 'some evidence' that Mr. Sharkey met both parts of the criteria listed in section [2600]* – a qualifying offense and a [likelihood] of engaging in sexually violent predatory behavior, the latter satisfied by Dr. Karlsson's October 10, 2008 Clinical Evaluation Summary and his October 29, 2008 written report.

"However, the court finds that the good cause definition set out in section [2600.1] of the CCR is clearly erroneous. *It is not a definition of good cause – a reason why more time is needed.* It simply declares that if the state of the underlying evidence is satisfactory under the 'some evidence' standard, the deadline is not enforced." Merely "because 'some evidence' exists that an inmate meets the criteria as a SVP cannot establish good cause to meet the filing deadline." (Italics added.)

The trial court concluded that because there was no good cause to extend the deadline, Sharkey was entitled to dismissal of the SVP commitment petition. The trial court extended its stay order to October 20, 2009 to enable the People to seek writ review of the order of dismissal.

5. *The People's petition for relief from the trial court's ruling.*

On September 22, 2009, the People filed the instant petition for writ of mandate, seeking to overturn the dismissal ruling and to reinstate the SVP petition. On September 29, 2009, this court issued an order to show cause and stayed the trial court's July 24, 2009 dismissal ruling pending further order of this court.

CONTENTIONS

The People contend: the trial court exceeded its jurisdiction in dismissing the SVP petition where Sharkey was in lawful custody at the time the petition was filed; the SVPA permits a petition to be filed if the person was in lawful custody at the time the petition is filed; the SVPA permits the Board to keep a potential SVP beyond his scheduled release date for full evaluation if some evidence exists that the inmate may be eligible for civil commitment as an SVP; the purpose and internal harmony of the SVPA as well as public policy support the correctness of California Code of regulations, title 15, section 2600.1; and the court exceeded its jurisdiction in dismissing the SVP petition where any violation of the timelines was the result of a good faith mistake of law or fact.

DISCUSSION

1. *Overview of the SVPA statutory scheme.*

The Legislature enacted the SVPA based upon a declared concern that "a small but extremely dangerous group of sexually violent predators [who] have diagnosable mental disorders [that] can be identified while they are incarcerated . . . are not safe to be at large and if released represent a danger to the health and safety of others in that they are likely to engage in acts of sexual violence." (Stats. 1995, ch. 762, § 1, p. 5913; accord *Garcetti v. Superior Court* (2000) 85 Cal.App.4th 1113, 1117.)

a. *Custodial evaluation of inmate for potential commitment as an SVP.*

The statutory scheme provides for screening and evaluation of an inmate prior to his or her scheduled release date, to determine whether the People should pursue civil commitment of the individual as an SVP.

"Whenever the Secretary of the Department of Corrections and Rehabilitation determines that an individual who is in custody under the jurisdiction of the Department of Corrections and Rehabilitation, and who is either serving a determinate prison sentence or whose parole has been revoked, *may be a sexually violent predator*, the secretary shall, *at least six months prior to that individual's scheduled date for release from prison*, refer the person for evaluation in accordance with this section."
(§ 6601, subd. (a)(1), italics added.)

The person "shall be screened by the Department of Corrections and Rehabilitation and the Board of Parole Hearings 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. This screening shall be conducted in accordance with a structured screening instrument developed and updated by the State Department of Mental Health in consultation with the Department of Corrections and Rehabilitation. If as a result of this screening it is determined that the person is likely to be a sexually violent predator, the Department of Corrections and Rehabilitation shall refer the person to the State Department of Mental Health for a full evaluation of whether the person meets the criteria in Section 6600." (§ 6601, subd. (b).)

The "State Department of Mental Health shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator as defined in this article. The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." (§ 6601, subd. (c).)

Pursuant "to subdivision (c), the person shall be evaluated by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designated by the Director of Mental Health, one or both of whom may be independent professionals as defined in subdivision (g). If both evaluators concur that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director of Mental Health shall forward a request for a petition for commitment under Section 6602 to the county designated in subdivision (i)." (§ 6601, subd. (d).)

b. *Proceedings on an SVP commitment petition.*

Once an SVP petition is filed, the trial court "shall review the petition and shall determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release." (§ 6602, subd. (a).) If the court determines there is probable cause, it "shall order that the person remain in custody in a secure facility until a trial is completed and shall order that a trial be conducted to determine whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release from the jurisdiction of the Department of Corrections or other secure facility." (*Ibid.*)

The individual facing potential commitment as an SVP is "entitled to a trial by jury, to the assistance of counsel, to the right to retain experts or professional persons to perform an examination on his or her behalf, and to have access to all relevant medical and psychological records and reports." (§ 6603, subd. (a).) If trial is by jury, the verdict must be unanimous. (§ 6603, subd. (f).)

c. *Provisions in issue herein.*

The focus of this case is section 6601.3, relating to the custodial evaluation of the inmate prior to his scheduled release date. It provides: "*Upon a showing of good cause,* the Board of Prison Terms may order that a person referred to the State Department of 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." (Italics added.)[4]

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[4] The Board of Parole Hearings "replaced the Board of Prison Terms by legislation enacted in 2005. (See Gov. Code, § 12838.4 [added by Stats. 2005, ch. 10, § 6, operative July 1, 2005], & Pen. Code, § 5075 [as amended by Stats. 2005, ch. 10, § 46, operative July 1, 2005].) It is sometimes referred to by its old appellation." (*In re Hovanski* (2009) 174 Cal.App.4th 1517, 1521, fn. 2.)

Section 6601.3 does not specify what constitutes "good cause" for a 45-day extension of time. However, the definition is supplied by California Code of Regulations, title 15, section 2600.1, subdivision (d), a regulation promulgated by the Board. The regulation states: "For purposes of this section, good 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, . . . which resulted in a conviction or a finding of not guilty by reason of insanity . . . . [¶] (2) *Some evidence* that the person is likely to engage in sexually violent predatory criminal behavior." (Italics added.)

The essential issue before us is the validity of the regulation's definition of good cause.

2. *Criteria in California Code of Regulations, title 15, section 2600.1 as to what constitutes good cause for imposition of a 45-day hold are proper.*

Penal Code section 3052 vests the Board with "the power to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole outside the prison buildings and enclosures when eligible for parole." As explained below, because the Legislature has delegated to the Board the power to make rules and regulate the parole eligibility of inmates (*ibid.*), and has conferred upon the Board the power to impose a 45-day hold for "good cause" (§ 6601.3), the Board's view of what constitutes good cause for imposition of such a hold is entitled to deference.

a. *Judicial review of administrative regulations.*

We begin by considering "the general framework of judicial review of administrative regulations. In *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*), [the Supreme Court] posited a dichotomy between 'quasi-legislative' and 'interpretive' rules. Quasi-legislative regulations are those 'adopted by an agency to which the Legislature has confided the power to "make law" ' (*id.* at p. 7), and such rules 'have the dignity of statutes' (*id.* at p. 10). On the other hand, interpretive

regulations are those which involve 'an agency's interpretation of a statute or regulation . . . ' (*id.* at p. 7, italics omitted), and are given variable deference according to a number of factors (*id.* at p. 12). . . . '[A]dministrative rules do not always fall neatly into one category or the other; the terms designate opposite ends of an administrative continuum, depending on the breadth of the authority delegated by the Legislature.' (*Id.* at p. 6, fn. 3.)" (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 798-799 (*Ramirez*).)

Regulations "that fall somewhere in the continuum may have both quasi-legislative and interpretive characteristics, *as when an administrative agency exercises a legislatively delegated power to interpret key statutory terms.* In *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999 (*Moore*), for example, [the Supreme Court] reviewed a regulation by the Board of Accountancy, the agency statutorily chartered to regulate the accounting profession in this state, providing that those unlicensed by that board could not use the title 'accountant.' The agency was interpreting a statute, Business and Professions Code section 5058, that forbids use of titles ' "likely to be confused with" ' the titles of ' " 'certified public accountant' " ' and ' " 'public accountant.' " ' (2 Cal.4th at p. 1011.) [*Moore*] stated: 'Inasmuch as enforcement of the provisions of the Accountancy Act, including section 5058, is entrusted to the [Board of Accountancy], it seems apparent that the Legislature delegated to the Board the authority to determine whether a title or designation not identified in the statute is likely to confuse or mislead the public. Since the Board was also authorized to seek an injunction against the use of such terms, its authority to "adopt, repeal, or amend such regulations as may be reasonably necessary and expedient for the . . . administration of [the Accountancy Act]" (§ 5010) includes the power to identify by regulation those terms which it finds are "likely to be confused with 'certified public accountant' or 'public accountant,' " the use of which may be enjoined under the broad prohibition of section 5058. To conclude otherwise would contravene the intent and purpose behind the statute.' (2 Cal.4th at pp. 1013-1014, italics added; see also *Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 362 [administrative agency with

rulemaking power is authorized to 'fill up the details' of a statutory scheme].)" (*Ramirez, supra*, 20 Cal.4th at p. 799, italics added.)

b. *California Code of Regulations, title 15, section 2600.1, subdivision (d)'s definition of good cause for imposition of a 45-day hold is proper.*

The regulation at issue in the present case, as in *Moore*, has both quasi-legislative and interpretive characteristics. The Legislature has expressly delegated to the Board "the power to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole outside the prison buildings and enclosures when eligible for parole." (Pen. Code, § 3052.) This delegation of legislative authority "includes the power to elaborate the meaning of key statutory terms." (*Ramirez, supra*, 20 Cal.4th at p. 800.) On the other hand, because the Board is engaged in construing the meaning of a portion of section 6601.3, its regulation is in some sense interpretive. (*Ramirez, supra*, at p. 800.)

If California Code of Regulations, title 15, section 2600.1 is considered a quasi-legislative regulation, it is certainly valid. " ' " '[I]n reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is "within the scope of the authority conferred" [citation] and (2) is "reasonably necessary to effectuate the purpose of the statute" [citation].' " ' " (*Ramirez, supra*, 20 Cal.4th at p. 800.)

We conclude, initially, that California Code of Regulations, title 15, section 2600.1 is within the scope of the Board's authority, conferred by Penal Code section 3052. The Penal Code section vests the Board with the power to promulgate regulations under which prisoners committed to state prisons may be allowed to go upon parole when eligible for parole. (Pen. Code, § 3052.) Further, the SVPA, at section 6601.3, provides that upon a showing of good cause, the Board may order a potential SVP remain in custody for up to 45 days beyond the person's scheduled release date for full evaluation. California Code of Regulations, title 15, section 2600.1, subdivision (d), which defines "good cause" for imposition of a 45-day parole hold, is within the scope of the Board's authority.

We also conclude said regulation is reasonably necessary to effectuate the purpose of section 6601.3 and of the SVPA generally. The purpose of the SVPA is to identify persons who have certain diagnosed mental disorders that make them likely to engage in acts of sexual violence and to confine them for treatment of their disorders as long as the disorders persist. (*People v. Dean* (2009) 174 Cal.App.4th 186, 191.) California Code of Regulations, title 15, section 2600.1 helps ensure a potential SVP is not released prematurely, before the completion of a necessary evaluation.

On the other hand, even assuming California Code of Regulations, title 15, section 2600.1 were viewed as a purely interpretive regulation, it has two attributes which weigh in favor of considerable judicial deference to the agency's interpretation. First, the interpretation is contained in a regulation formally adopted pursuant to the Administrative Procedure Act (Gov. Code, § 11340 et seq.) " ' "[A]n interpretation of a statute contained in a regulation adopted after public notice and comment is more deserving of deference than [one] contained in an advice letter prepared by a single staff member." ' " (*Ramirez, supra*, 20 Cal.4th at p. 801.) Second, the regulation is entitled to greater deference because it embodies a statutory interpretation that the administrative agency has consistently maintained and is of long-standing, i.e., for over 14 years. (Register 1995, No. 52; compare *Ramirez, supra,* 20 Cal.4th at p. 801 [regulation in issue embodied statutory interpretation that agency had maintained for nearly 20 years].)[5]

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[5] California Code of Regulations, title 15, section 2600.1, as a new section filed December 26, 1995 as an emergency, provided for a 45-day hold based upon *some evidence* of a qualifying offense, *some evidence* the person has a diagnosed mental disorder that predisposes the person to the commission of criminal sexual acts, and *some evidence* that the qualifying offense was directed toward a stranger or individual with whom a relationship had been established or promoted for the primary purpose of victimization. (Register 95, No. 52, 12-29-95.) Then, as now, there was no requirement of a showing why the evaluations could not be completed before the scheduled release date.

For these reasons, the Board's definition of good cause for imposition of a 45-day hold (Cal. Code Regs., tit. 15, section 2600.1, subd. (d)), i.e., some evidence of a qualifying offense and some evidence the person is likely to engage in sexually violent predatory criminal behavior, is entitled to deference regardless of whether it is deemed a quasi-legislative or an interpretive regulation. We conclude the Board's interpretation of the term "good cause" is reasonable and should not be invalidated.

c. *The Board had good cause, within the meaning of California Code of Regulations, title 15, section 2600.1, to impose a 45-day hold.*

The trial court ruled the subject regulation is invalid, but if the regulation were given credence, its criteria for good cause were met. To reiterate, the trial court found: "Under the definition of good cause in section [2600.1] of the regulations, there is good cause. *There was 'some evidence' that Mr. Sharkey met both parts of the criteria* listed in section [2600.1] – a qualifying offense and a [likelihood] of engaging in sexually violent predatory behavior, the latter satisfied by Dr. Karlsson's October 10, 2008 Clinical Evaluation Summary and his October 29, 2008 written report." (Italics added.)

For the reasons set forth above, we conclude the regulation in issue is valid. (Cal. Code Regs., tit. 15, § 2600.1, subd. (d).)

Further, the regulation's criteria for imposition of a 45-day hold were clearly satisfied. As the trial court acknowledged, there was *some evidence* before the Board of a qualifying offense and *some evidence* that Sharkey was likely to engage in sexually violent predatory criminal behavior. Therefore, we conclude the Board properly imposed a 45-day hold in this matter. Accordingly, Sharkey's motion to dismiss the SVP petition on the ground the 45-day hold was unjustified and that his custody was unlawful was meritless and should have been denied.

3. *Trial court compounded its error by failing to give credence to section 6601, subdivision (a)(2).)*

Although the trial court was of the view that the subject regulation is invalid, the trial court should have denied Sharkey's motion to dismiss the SVP petition. The SVPA statutory scheme includes the following provision: "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, subd. (a)(2), italics added.)

Notwithstanding this code section, the trial court granted Sharkey's dismissal motion. The trial court reasoned that even assuming the Board relied on California Code of Regulations, title 15, section 2600.1 to extend the deadline by 45 days, "the court finds that because the regulation eviscerates the common legal definition of good cause, it could not be reasonably relied upon under these circumstances. The People did not establish a mistake of either fact or law." In effect, the trial court faulted the Board and the People for not being prescient that this longstanding regulation upon which they had relied might be judicially invalidated.

Although the trial court believed the subject regulation is invalid, the trial court should have recognized that absent a judicial determination of invalidity, the Board and the People were entitled to rely on the regulation, so as to preclude a dismissal of the petition. (§ 6601, subd. (a)(2).)

CONCLUSION

The Board is an integral part of the SVPA statutory scheme. (§ 6601, subd. (b).) In order to protect the public from premature release of potentially dangerous individuals, the statutory scheme provides for extensive screening and evaluation of such persons prior to their scheduled release date to determine whether the People should pursue their civil commitment pursuant to the SVPA. If some additional time is required to complete the evaluation process, the Board may, for good cause, impose a hold for up to 45 days beyond the scheduled release date for full evaluation. (§ 6601.3.) Good cause for such extension requires some evidence of a qualifying offense and some evidence the person is likely to engage in sexually violent predatory criminal behavior. (Cal. Code Regs., tit. 15, § 2600.1, subd. (d).) Good cause for the 45-day hold does not require a showing why the evaluations could not have been completed prior to the scheduled release date.

DISPOSITION

The order to show cause is discharged. The stay of proceedings is lifted. The petition for writ of mandate is granted. Let a peremptory writ of mandate issue, directing respondent superior court to vacate its order granting Sharkey's motion to dismiss the petition to commit him as an SVP, and to enter a new and different order denying the dismissal motion and setting the matter for proceedings pursuant to the SVPA.

CERTIFIED FOR PUBLICATION

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.

DECLARATION OF SERVICE

I, the undersigned, declare:

I am over eighteen years of age, and not a party to the within cause; my business address is 320 West Temple Street, Suite 590, Los Angeles, California 90012; that on April 29, 2010, I served a copy of the within PETITION FOR REVIEW on each of the persons named below by depositing a true copy thereof, enclosed in a sealed envelope with postage fully prepaid in the United States Mail in the County of Los Angeles, California, addressed as follows:

PAMELA C. HAMANAKA
SENIOR ASSISTANT ATTORNEY GENERAL
STATE OF CALIFORNIA
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

HONORABLE MARIA E. STRATTON
JUDGE, SUPERIOR COURT
DEPARTMENT 95
1150 N. SAN FERNANDO ROAD
LOS ANGELES, CALIFORNIA 90012

CLERK, CALIFORNIA COURT OF APPEAL
DIVISION THREE
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

I further declare that I served the above referred-to document by hand delivering a copy thereof addressed to:

STEVE COOLEY, DISTRICT ATTORNEY
APPELLATE DIVISION
320 WEST TEMPLE STREET, SUITE 540
LOS ANGELES, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 29, 2010 at Los Angeles, California.

ZENAIDA GAETOS