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IN THE SUPREME COURT OF CALIFORNIA

In re DAVID LUCAS, Petitioner,	)	California Supreme Court
	)	Case No. 181788
	)	
On Habeas Corpus.	)	Court of Appeal, 3rd Dist.
	)	Case No. C062809
	)	
	)	Placer County Sup. Ct.
	)	Case No. SCV-23989
	)	
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PETITIONER'S OPENING BRIEF ON THE MERITS

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

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

STATEMENT OF ISSUES

[In accordance with Rule 8.520(b)(2) of the California Rules of Court, petitioner sets forth the statement of issues – including a synopsis of the case – that appeared in the petition for review.]

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 that 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 and in the

petition for review filed in this court. 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, petitioner 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 previously, the Board of Parole Hearings had been entitled to rely on section 2600.1(d) at the time it 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?

STATEMENT OF INCLUDED ISSUES

Rule 8.520(b)(3) of the Rules of Court provides that briefs on the merits must be limited to the issues stated in Rule 8.520(b)(2) and any issues "fairly included in them."

Petitioner believes a complete statement of the issues presented in this case, those presented in the petition for review, as well as the issues necessarily included in them, to be as follows:

(1) What constitutes "good cause" for imposition of a 45-day hold under Welfare and Institutions Code section 6601.3?;

(2) Is section 2600.1 of Title 15 of the California Code of Regulations, read as a whole, consistent with the legislative purpose of section 6601.3?;

(3) Did imposition of the 45-day hold in the circumstances of petitioner's case constitute a "good faith mistake of fact or law" under Welfare & Institutions Code section 6601(a)(2)?

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 the California Department of Corrections 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 Petition, 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 [Court of Appeal Writ Petition, Exhibit D].

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 Petition, 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 Petition, 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 Petition, 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 Petition, 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 Petition, 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 Petition, 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 Petition, 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 t 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 Petition, 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 the Superior Court.

On November 26, 2008, the Superior Court (Judge McElhany) 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 Petition, Exhibit O].

On July 27, 2009, the Superior Court (Judge Nichols) issued an order denying the petition [Court of Appeal Writ Petition, 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, at 182 Cal.App.4th 797, 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.

On April 13, 2010, Lucas filed a petition for review in the California Supreme Court. The Court granted review June 18, 2010.

ARGUMENT

I

PETITIONER WAS NOT IN THE LAWFUL CUSTODY OF THE DEPARTMENT OF CORRECTIONS AT THE TIME THE SEXUALLY VIOLENT PREDATOR PETITION WAS FILED

A

IT WAS THE INTENT OF THE LEGISLATURE THAT 45-DAY HOLDS UNDER WELFARE & INSTITUTIONS CODE SECTION 6601.3 BE IMPOSED ONLY IN CASES WHERE, DUE TO CIRCUMSTANCES BEYOND THE CONTROL OF THE DEPARTMENT OF CORRECTIONS, THE SVP EVALUATION PROCESS CANNOT BE COMPLETED PRIOR TO THE INMATE'S RELEASE DATE

Welfare & Institutions 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 California 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 sections (c) through (i) of section 6601.

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 <u>beyond the scheduled release date</u> (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 accommodate 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 Traverse, Exhibit H, p. 3].

B

UNDER TITLE 15, CALIFORNIA CODE OF REGULATIONS SECTION 2600.1(a), THE BOARD OF PAROLE HEARINGS MAY ONLY CONSIDER IMPOSING 45-DAY HOLDS IN CASES WHERE "EXCEPTIONAL CIRCUMSTANCES" EXIST

In the companion case to petitioner's case, *People v. Superior Court of Los Angeles County (Christopher Sharkey)*, S-182355, Sharkey points out in his opening brief that the Courts of Appeal in both the *Lucas* and *Sharkey* cases interpreted subsection 2600.1(d) of the Code of Regulations in isolation from the other subsections of 2600.1. Petitioner believes that Sharkey's point is well-taken.

Subsections (a) and (b) of section 2600.1 read as follows:

> (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 the Welfare and Institutions Code *where exceptional circumstances preclude an earlier evaluation of the person* [emphasis added]. 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.

Subsection (d) of section 2600.1, reads, in pertinent part:

> (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 an 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, 288a, 288.5, 289 or any felony violation of sections 207, 209, or 220, committed with the intent to commit a violation of sections 262, 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.
>
> ...
>
> (2) Some evidence that the person is likely to engage in sexually violent predatory behavior.

Subsections (a) and (b), when read in connection with the remaining subsections of section 2600.1, appear to outline a process that is based on a threshold requirement that "exceptional circumstances" exist. "Exceptional circumstances" must exist before any further proceedings under section 2600.1

take place.

Section 2600.1(a) defines "exceptional circumstances" as circumstances that "preclude an earlier evaluation of the person pursuant to section 6601 of the Welfare and Institutions Code."

Under section 2600.1, read as a whole, the question of "exceptional circumstances" is not submitted to or reviewed by the Board of Parole Hearings. It is assumed that exceptional circumstances exist as a threshold matter, and all that is left for the Board to decide, under subsection (d), is whether there is some evidence that the inmate or parolee meets the sexually violent predator criteria.

Read in this way, Section 2600.1 can be reconciled with section 6601.3 of the Welfare and Institutions Code, and with section 6601.3's underlying purpose.

At first glance, it may appear that "exceptional circumstances" in section 2600.1(a) are meant to be a prerequisite to 3-days hold, but not to 45-day holds, but petitioner does not believe this to be the case. Three-day holds are not mandatory under subsection (a). The board "may," but is not required to impose them. In both petitioner's case and Sharkey's case, the good cause hearings, such as they were, were held prior to each inmates' release date, and there would have been no reason to extend either petitioner's or Sharkey's

custody for three days thereafter. As Sharkey points out in his opening brief in the companion case, "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 (citation)."

Petitioner does not suggest that section 2600.1, read as a whole, is a model of clarity, or that there isn't a better way to define or determine whether "exceptional circumstances" exist. Petitioner merely suggests that in order to harmonize section 2600.1 with the purpose underlying section 6601.3 of the Welfare and Institutions Code, and to harmonize the subsections of section 2600.1 with each other, "exceptional circumstances" must refer to the types of situations described in the legislative documents cited in Section I-A of this brief, above – unforeseen changes in release dates, short returns to custody for parole violators, etc. The language of section 2600.1(a) itself supports that interpretation.

If somehow "exceptional circumstances" are not a threshold requirement for the entire process described in section 2600.1, then subsection 2600.1(d), standing on its own, would be inconsistent with the legislative purpose underlying section 6601.3 of the Welfare and Institutions Code, and invalid, as the Court of Appeal in petitioner's case determined it to be.

C

THE BOARD OF PAROLE HEARINGS EXTENDED PETITIONER'S PRISON COMMITMENT WITHOUT A SHOWING OF GOOD CAUSE AS REQUIRED BY WELFARE & INSTITUTIONS CODE SECTION 6601.3

In petitioner's case, a correctional officer at Corcoran took the first step in the SVP screening and evaluation process by completing CDC Form 7377 [Court of Appeal Writ Petition, Exhibit D] on December 21, 2007. However, nothing happened from that date until the screening form was received at the Classification Services Unit on October 1, 2008 – eleven days before Mr. Lucas's parole release date.

As a result, on October 9, 2008, a deputy commissioner with the Board of Parole Hearings imposed a 45-day hold pursuant to W&I Code section 6601.3. The hold was effective from October 12, 2008, until November 26, 2008. [BPH Form 1135, Court of Appeal Writ Petition, Exhibit I]

The decision form states that the hold was to be placed "to facilitate full SVP evaluations to be concluded by the DMH." No other reason or explanation for the hold is given. Good cause is not even mentioned. Section 2600.1 is not even mentioned. "Exceptional circumstances" are not even mentioned.

In this case, petitioner had been committed to the Department of

Corrections for a term of seven years. He was not serving a brief term for a parole violation. His release date had not been moved up unexpectedly as a result of a sentence modification or a reinstatement of time credits.

Petitioner arrived at the reception center May 21, 2003, then served the entire sentence at Corcoran State Prison [Court of Appeal Writ Petition, Exhibit C]. By the time the 45-day hold was imposed October 9, 2008, he had been in uninterrupted prison custody for *almost five-and-a-half years.*

At the hearing October 9, 2008, there was no "showing" and there was no "good cause." The Board of Parole Hearings imposed the 45-day hold for one reason, and one reason only – the Department of Corrections had neglected to complete the screening process and refer the case to the Department of Mental Health on time.

II

PETITIONER'S UNLAWFUL CUSTODY WAS NOT THE RESULT OF A GOOD FAITH MISTAKE OF FACT OR LAW

A

THE BOARD OF PAROLE HEARINGS COULD NOT HAVE BEEN RELYING ON SECTION 2600.1 OF THE CODE OF REGULATIONS WHEN IT IMPOSED THE 45-DAY HOLD, BECAUSE "EXCEPTIONAL CIRCUMSTANCES" ARE A PREREQUISITE TO ANY PROCEEDINGS UNDER SECTION 2600.1

In petitioner's case, there is no evidence the Board of Parole Hearings was relying on section 2600.1 when it imposed the 45-day hold on October 9, 2008. The Board's Decision Form [Court of Appeal Writ Petition, Exhibit "I"] contains no reference to Section 2600.1. The decision form simply states, "Place a 45-day 'No Bail' hold, pursuant to WIC 6601.3, to facilitate full SVP evaluations to be concluded by the DMH." [The deputy commissioner who imposed the 45-day hold in the companion case used the same language. See Sharkey, Opening Brief, Summary.]

Even if the Board was relying on section 2600.1, it could not have been doing so in good faith.

As described in Section I-B of this opening brief, section 2600.1(a) of the Code of Regulations requires that "exceptional circumstances" exist which "preclude an earlier evaluation of the person pursuant to section 6601 of the Welfare and Institutions Code." Without exceptional circumstances,

there is no basis for proceedings under section 2600.1 to even begin.

If the Board of Parole Hearings had been relying, in good faith, on section 2600.1, it would have acted in a way that carried out the purpose of section 2600.1. The purpose of section 2600.1, and of section 6601.3 of the Welfare and Institutions Code, is to give the Department of Corrections and the Department of Mental Health, additional time to complete their respective evaluations in cases where "exceptional circumstances" make it impossible for them to complete the evaluations before the inmate is due to be released from custody. The purpose of sections 2600.1 and 6601.3 is not to give the departments additional time whenever, and for whatever reason, an SVP evaluation is not completed prior to the inmate's release date.

When a government agency, such as the Department of Corrections, submits a measure to the Legislature on the basis that it is to be used in case of emergency, or in case of exceptional circumstances, then proceeds to use that measure when there are no such circumstances, or worse, when the circumstances involve the agency's own negligence – as occurred in petitioner's case – the agency is acting in bad faith, not good faith.

No commissioner or deputy commissioner on the Board of Parole Hearings could have relied, in good faith, on subsection (d) of section 2600.1, standing by itself, in imposing a 45-day hold.

Subsection (b) of section 2600.1 provides that the good cause determination outlined in subsections (c) and (d) of Section 2600.1 must take place within the time period of the temporary hold described in subsection (a) of section 2600.1. It is apparent that subsections (a), (b), (c), and (d) were meant to be read together and to outline a single process.

The definition of "good cause" in subsection (d) merely restates the sexually violent predator criteria set forth in section 6600 of the Welfare and Institutions Code. It does not refer to any of the circumstances that gave rise to section 6601.3. When read in isolation from subsection (a) of section 2600.1, it is inconsistent with the legislative purpose underlying section 6601.3.

As the trial court in the companion case observed, good cause for a 45-day hold cannot be established merely by showing that the inmate or parolee likely meets the SVP criteria any more than good cause for a continuance in a criminal case can be established merely by showing that there is probable cause to believe the defendant committed the offense charged.

A commissioner or deputy commissioner on the Board of Parole Hearings, acting in good faith, would have known, or would have taken the trouble to ascertain, the purpose of sections 6601.3 and 2600.1, and would

not have imposed a 45-day hold in a case where there was no justification for it.

A commissioner or deputy commissioner who simply did not want petitioner released from custody, regardless of the circumstances, and who did not want the person or persons within the Department of Corrections who lost track of petitioner to be exposed to criticism, would have done what the deputy commissioner did in petitioner's case – acted expediently, rather than in good faith.

B

IN PETITIONER'S CASE, THE BOARD OF PAROLE HEARINGS COULD NOT HAVE BEEN ACTING BASED ON A GOOD FAITH MISTAKE OF LAW AS TO THE PURPOSE OF SECTION 2600.1, WHEN THE DEPARTMENT OF CORRECTIONS, OF WHICH THE BOARD IS A PART, PROPOSED SECTION 6601.3 TO THE LEGISLATURE IN THE FIRST PLACE

As described in detail in Section I-A of this opening brief, above, the provision for 45-day extensions of custody was added to the Sexually Violent Predator Act at the request of the Department of Corrections, so that the Department of Corrections and the Department of Mental Health could complete the SVP evaluation process in cases where, due to circumstances beyond their control, there was insufficient time to complete the process prior to the inmate's release date.

In petitioner's case, the Board of Parole Hearings could not have been mistaken as to the purpose of section 6601.3 or section 2600.1, when the Department of Corrections, of which the Board is a part, proposed section 6601.3 to the legislature in the first place. The Department of Corrections cannot claim it did not understand its own measure. Any defect in the drafting of section 2600.1, any use of section 2600.1 inconsistent with its underlying purpose, could only have resulted from negligence or from deliberate action by the Department of Corrections or the Board of Parole Hearings.

As Sharkey points out in his opening brief in the companion case, the appointment, qualifications, and training of Board of Parole Hearings commissioners and deputy commissioners are regulated by statute. It is the responsibility of the Department of Corrections to see to it that commissioners and deputy commissioners on the Board of Parole Hearings understand the laws and administrative regulations they carry out.

In petitioner's case, if the deputy commissioner who imposed the 45-day hold simply did not understand the purpose of sections 6601.3 and 2600.1, it was because the Department of Corrections failed to train and supervise him in that regard. If the deputy commissioner simply acted without regard to those provision, his negligent or deliberate act would be

attributable to the Department of Corrections. Under the doctrine of respondeat superior, a principal or employer is liable for the actions of an agent or employee committed while acting within the scope of employment, even if the employee acts in excess of authority or contrary to instructions. (See Civil Code section 2338; Restatement 2d, Agency, Sections 219, 243 et seq.; *Johnston v. Long* (1947) 30 Cal.2d 54, 61.)

Forty-five day extensions of custody were proposed to the Legislature by the Department of Corrections as a result of circumstances arising during the day-to-day administration of the state prison system. More so than any other agency, more so even than a reviewing court, the Department of Corrections and the Board of Parole Hearings were in a position to know exactly what 45-day holds were for.

C

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. *In re David Lucas* (2010) 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 882.

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 the Board'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 prior to October 9, 2008, the Board's action on that date, or both.

The Board's action on October 9, 2008, did not occur in isolation. The Board's action was the 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 tort cases, 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 t he 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.

In petitioner's case, the Court of Appeals held that good cause did not exist for imposition of the 45-day hold, but attributed the unlawfulness of petitioner's custody during the period of the hold to a good faith mistake of law. The court based its decision on *People v. Hubbart* (2001) 88 Cal.App.4th 1202.

Hubbart's parole had been 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.

Petitioner's case is readily distinguishable from *Hubbart*. In *Hubbart*, it only became apparent that the Department of Corrections had acted in excess of its authority when it used section 2616(a)(7) to revoke Hubbart's parole when section 2616(a)(7) was considered in comparison with *other* provisions of law:

> Because the Legislature has so fully occupied the subject matter we conclude that the Board's utilization of the expedient of parole revocation under section 2616(a)(7) instead of civil commitment for the mentally disordered inmate who is about to be released into the community is unauthorized. *Terhune*, supra, p. 878.

The type of determination the court made in *Hubbart* – involving competing provisions of law --was one a court, rather than an administrative agency, would be expected to make. The court did not fault the parole board for the action it took. As the court concluded, *There is no evidence of any negligence or intentional wrongdoing here* [emphasis added]." *Hubbart*, supra, p. 1229.

In petitioner's case, by contrast, negligence occurred on two levels. First, the Department of Corrections lost track of petitioner. from December

21, 2007, until October 1, 2008. Second, the Board of Parole Hearings imposed the 45-day extension, when it knew, or should have known, that exceptional circumstances – circumstances which "preclude an earlier evaluation of the person" – must exist before a 45-day hold can be imposed.

III

CONCLUSION

Petitioner David Lucas arrived at Corcoran State Prison September 25, 2003, and was still there October 9, 2008, when the Board imposed the 45-day hold. During those five and-a-half years, aside from a few audits, *nothing happened.* [CDCR Chronological History, Court of Appeal Writ Petition, Exhibit C].The only thing exceptional about petitioner's term at the Department of Corrections was how *uneventful* it was.

This petition has been heard by the trial court and by the Court of Appeals. No justification for the delay that occurred in petitioner's case has ever been offered.

As noted earlier, unexplained delay in completing the Sexually Violent Predator evaluation process does not qualify as a good faith mistake of law or fact. *People v. Superior Court (Small)*, supra, 159 Cal.App.4th 301, 309-301.

Neither does misusing section 6601.3 of the Welfare and Institutions Code, which was conceived by the Department of Corrections itself, nor

misusing section 2600.1 of the Code of Regulations, which contains on its face a requirement of "exceptional circumstances."

For the Board of Parole Hearings to impose a 45-day hold in order to avoid the consequences of losing track of petitioner for nine and-a-half months, then claim to have been acting in good faith, of all things, is to add insult to injury.

Even if – somehow – the imposition of the 45-day hold in petitioner's case could be attributed to an honest mistake about the purpose of section 2600.1, the good faith exception of section 6601(a)(2) *still* would not apply. But for the nine and-a-half month lapse in the evaluation process there would have been no need for the Board to even hold a hearing. The true cause of petitioner's unlawful custody after October 12, 2008, was the inaction of the Department of Corrections, not the action of the Board of Parole Hearings.

To disconnect petitioner's unlawful custody from the nine and-a-half month delay that led up to it is to rewrite reality. Human events rarely occur in isolation from other events. The Board's action on October 9, 2008, certainly did not.

Strangely, the Court of Appeal in petitioner's case held that the Department's failure to complete the evaluation process on time was pertinent as to the issue of *good cause* under section 6601.3, but not as to the issue of

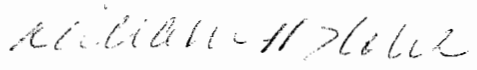
good faith under section 6601(a)(2). The rules of legal causation, discussed earlier, and the rules of common sense, suggest otherwise.

Petitioner was not in the lawful custody of the Department of Corrections at the time the Sexually Violent Predator petition was filed against him. His unlawful custody was not the result of a good faith mistake of fact or law, but rather the result of negligence, and possibly a deliberate act of bad faith, on the part of the Department of Corrections and the Board of Parole Hearings.

A petition for writ of habeas corpus is the proper vehicle for presenting a challenge to commitment proceedings under the Sexually Violent Predator Act. *People v. Talhelm* (2000) 85 Cal.App.4th 400. Dismissal is the appropriate remedy where the inmate's unlawful custody is not the result of a good faith mistake of fact or law. *People v. Badura* (2002) 95 Cal.App.4th 1218, 1224. Petitioner believes more than sufficient grounds have been set forth for a writ of habeas corpus to issue.

Dated: August 16, 2010

Respectfully submitted,



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WORD-COUNT CERTIFICATE

I hereby certify, under penalty of perjury, that the foregoing opening brief on the merits contains 7,839 words, as determined by the word-processing program used to prepare the brief.

Dated: August 16, 2010

Respectfully submitted,

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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 August 16, 2010, I personally US mailed a true copy of

☐ Motion

☐ Petition

☒ Other: Petitioners Opening Brief on the Merits

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Case Number: California Supreme Court Case # S181788

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

Executed August 16, 2010, at Auburn, California.

Julie Hendricks