SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DAVID LUCAS, Petitioner, **On Habeas Corpus**	Case No. S181788

Third Appellate District, Case No. C062809
Placer County Superior Court, Case No. SCV-23989
Hon. Colleen Nichols, Judge

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ISSUES PRESENTED

1) What constitutes "good cause" for the imposition of a 45-day hold and extension of a scheduled parole date under Welfare and Institutions Code section 6601.3 to permit evaluation of the defendant under the Sexually Violent Predator Act?

2) Is California Code of Regulations, title 15, section 2600.1, subdivision (d), which defines the term "good cause" as used in section 6601.3 as "some evidence" that the inmate has a prior qualifying conviction and is likely to engage in predatory criminal behavior, a valid regulation?

3) Does the "good faith mistake of law or fact" exception apply in this case?

INTRODUCTION

Petitioner David Lucas was a prisoner at Corcoran State Prison scheduled to be released on parole[1] on October 12, 2008. Three days before his scheduled release date, the Board of Parole Hearings[2], acting under Welfare and Institutions Code section 6601.3, issued a 45-day hold of the petitioner to enable the State Department of Mental Health (DMH) to complete a full evaluation of petitioner under the Sexually Violent Predator Act (section 6600, et seq.) (SVPA or the Act).[3] Section 6601.3 permits, upon a showing of good cause, the Board to issue a 45-day hold of a prisoner who has been referred to DMH pursuant to section 6601,

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[1] "The [California] Department [of Corrections and Rehabilitation] (CDCR) calculates an earliest possible release date (EPRD) for each inmate. [Citations.]" (*In re Tate* (2006) 135 Cal.App.4th 756, 759.)

[2] The Board of Parole Hearings (hereinafter the Board), formerly the Board of Prison Terms, was created in 2005. (Gov. Code, § 12838.4.)

[3] Unless otherwise designated, all further statutory references are to the Welfare and Institutions Code.

subdivision (b), for a full evaluation under the Act. In a petition for writ of habeas corpus in the Third District Court of Appeal, petitioner challenged the trial court's failure to grant his motion to dismiss the subsequently filed SVP petition on the grounds that the Board failed to make a showing of good cause as required by section 6601.3. While section 6601.3 does not specify what constitutes "good cause" for such a hold, California Code of Regulations, title 15, section 2600.1, subdivision (d) (regulation 2600.1(d)), provides a definition. It is this definition, and ultimately the validity of regulation 2600.1(d), which is at issue in this case.

The good cause requirement of section 6601.3 is, pursuant to legislative intent, a showing that due to circumstances such as a recalculation of credits causing an inmate's earliest possible release date (EPRD) to be unexpectedly moved up or a short parole revocation term, it was difficult or impossible to complete the sexually violent predator (SVP) evaluation within the statutory time frame. The Third District Court of Appeal, in the habeas proceeding filed by petitioner, properly determined that regulation 2600.1(d) is not a valid regulation. The definition of good cause provided by regulation 2600.1(d) is inconsistent with the legislative intent underlying section 6601.3's good cause requirement. As written, good cause does not require a showing of circumstances such as a recalculation of credits or short parole revocation term. In fact, there is no change or exigent circumstances required at all in order for the 45-day hold to be imposed; all persons referred to the DMH for a full evaluation are, by virtue of the same criteria used to refer them, eligible to be held 45 days beyond their EPRD. Nevertheless, as held by the Court of Appeal, in this case, petitioner's unlawful custody was the result of a good faith mistake of law because the Board relied on regulation 2600.1(d) prior to any judicial determination that the regulation was invalid. Thus, petitioner is not entitled to the dismissal of the SVP petition because he was in unlawful

custody as the result of a good faith mistake of law at the time of the filing of the petition.

STATEMENT OF THE CASE

In 2003, petitioner was convicted in Placer County of failing to register as a sex offender in violation of Penal Code section 290. He was sentenced to a determinate term of seven years in prison, and his EPRD was determined to be October 12, 2008. (Pet. Exh. D.)[4]

On December 21, 2007, over nine months before his EPRD, CDCR completed an SVP screening (CDC Form 7377) and determined that petitioner met the criteria for a potential SVP based on a prior conviction for lewd and lascivious acts with a child in 1979 and a prior conviction for rape in 1968. (Pet. Exh. D.) The form indicates that it was not received by the Classification Services Unit of CDCR until October 1, 2008, just 11 days before petitioner's EPRD. (Pet. Exh. E.) The Classification Services Unit determined that some court documents were missing for the prior offenses and that a re-screening was necessary. (*Ibid.*) The following day, October 2, 2008, the Classification Services Unit forwarded the case to the Board for further processing and investigation to determine if petitioner met the first level criteria as an SVP pursuant to section 6600, subdivision (a). (Pet. Exh. F.) It explained that CDCR was unable to make a final determination based on the available documentation. (*Ibid.*)

On October 7, 2008, the Board determined that petitioner met the first level SVP criteria for referral to DMH based on his conviction for lewd and

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[4] "Pet. Exh." hereinafter refers to Exhibits to the Petition for Writ of Habeas Corpus filed in *In re David Lucas* (2010) 182 Cal.App.4th 797, review granted June 17, 2010, S181788 (*Lucas*).

lascivious touching of a child in 1979, and referred Petitioner to DMH for assessment.[5] (Pet. Exh. G.)

On October 9, 2008, three days prior to petitioner's EPRD, a psychiatrist completed a Level II screen and recommended petitioner be referred for a Level III evaluation. (Pet. Exh. H.) That same day, the Board imposed a 45-day hold pursuant to section 6601.3, determining that petitioner met the initial screening criteria for SVP proceedings and that the no-bail hold would "facilitate full SVP evaluations to be concluded by the DMH." (Pet. Exh. I.) The hold was effective until November 26, 2008. (*Ibid.*) During the period of the hold, four reports by psychologists were completed, three of which concluded petitioner met the SVP criteria. (Opening Brief on the Merits (OBM) at p. 3; Pet. Exh. J.)

On November 17, 2008, DMH referred petitioner's case to the Placer County District Attorney to file an SVP civil commitment petition. (Pet. Exh. L.) The district attorney filed a petition for commitment of petitioner as an SVP on November 20, 2008. (Opp. Exh. A.)[6] On November 26, 2008, the trial court found the petition stated sufficient facts to support a finding of probable cause and ordered petitioner detained pending a probable cause hearing. (*Lucas*, Slip Opn. at p. 4.) On December 3, 2008, petitioner entered a time waiver on the probable cause hearing. (*Ibid.*)

On April 1, 2009, petitioner filed a motion to dismiss the SVP petition alleging statutory and constitutional violations as a result of the late completion of the screening and evaluation process. (Opp. Exh. B.)

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[5] Level I screen refers to section 6601, subdivision (b), in which the person shall be screened by CDCR and the Board based on whether the person has committed a sexually violent predatory offense and on a review of the person's social, criminal, and institutional history.

[6] "Opp. Exh." hereinafter refers to Exhibits attached to the Opposition to Petition for Writ of Habeas Corpus in *Lucas*.

Petitioner argued in part that there was no showing of good cause under section 6601.3 to keep him in custody beyond October 12, 2008, pointing out that the problem with the regulation is that "it permits a 45-day hold to be placed in *every* SVP case," whether or not there is any justification for the hold. (Opp. Exh. B at 13, italics in original.) On April 9, 2009, the district attorney filed a response in opposition arguing the Board made a showing of good cause and acted within its discretion. (Opp. Exh. C.) On April 29, 2009, the trial court denied petitioner's motion. (Pet. Exh. N.) On June 9, 2009, petitioner filed a petition for writ of habeas corpus with the trial court which was denied on July 27, 2009. (Pet. Exhs. O-R.) As pertinent here, the trial court determined that, "Although the CDC waited until the last minute, the fact remains that the process was completed within the statutory framework." (Pet. Exh. R at p. 5.)

On September 3, 2009, petitioner filed a petition for writ of habeas corpus in *Lucas*. He argued in part that there was no showing of good cause under section 6601.3 to extend his EPRD of October 12, 2008, and he was therefore not in the lawful custody of CDCR at the time the SVP petition was filed on November 20, 2008. The People opposed the petition, arguing that good cause existed for the Board to order the 45-day hold pursuant to section 6601.3 as supplemented by regulation 2600.1(d). Furthermore, even if petitioner's custody was unlawful, his custody was the result of a good faith mistake of law and therefore the SVP petition should not be dismissed (§ 6601, subd. (a)(2)). On October 22, 2009, the Court of Appeal issued an order to show cause limited to the claim that the petitioner's extended commitment under section 6601.3 was unlawful because there was no showing of good cause as required by the statute.

On March 5, 2010, the Court of Appeal filed its published opinion in *Lucas* holding that at the time the Placer County District Attorney filed the SVP petition, petitioner was not in the lawful custody of CDCR because the

Board had imposed a 45-day hold under section 6601.3 without the showing of good cause required by the statute. The Court of Appeal explained that good cause under the statute 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 timeframe. It further held that regulation 2600.1(d), which essentially provides that there is good cause for a hold if there is some evidence that the person may be an SVP, is invalid because it is inconsistent with the legislative intent behind section 6601.3. Nevertheless, the Court of Appeal denied the petition for writ of habeas corpus on the ground that the Board had relied on the regulation in placing the 45-day hold and the regulation was apparently valid when the Board relied on it. Thus, the Board's reliance on the regulation constituted a good faith mistake of law.

Subsequently, this Court granted review in *Lucas* and *People v. Superior Court* (*Sharkey*) (2010) 183 Cal.App.4th 85, 107 Cal.Rptr.3d 201, review granted June 17, 2010, B219011 (*Sharkey*).[7]

SUMMARY OF ARGUMENT

The Court of Appeal properly determined that the showing of good cause necessary for imposition of a 45-day hold under section 6601.3 is something exceptional that makes it difficult or impossible to complete the SVP evaluation within the statutory timeframe. The legislative history of

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[7] *Sharkey* is the companion case to Lucas in which the Second District Court of Appeal upheld the validity of regulation 2600.1(d), concluding that the regulation's standard for good cause is proper. (*Sharkey*, *supra*, 107 Cal.Rptr.3d at pp. 203-204.) In that case, the good cause requirement was met, that is, there was some evidence that Sharkey had committed a qualifying offense and some evidence he is likely to engage in sexually violent predatory criminal behavior. The *Sharkey* court granted the People's petition for writ of mandate and directed the trial court to reinstate the SVPA commitment petition. (*Ibid.*)

the statute and the amendment adding the good cause requirement reveal that the Legislature contemplated circumstances such as the restoration of custody credits or a short parole revocation term which would render the normal timeframe for a full SVP evaluation impracticable. This is also borne out by a recent amendment to the statute, effective January 1, 2011, which provides a definition of good cause as encompassing these types of exigent circumstances. Consequently, regulation 2600.1(d), which defines good cause in the statute as being essentially some evidence that an inmate may be an SVP, is not a valid regulation. The regulation must be deemed void as it conflicts with the very statute it claims to interpret and sanctioning its use would defeat the purpose of the statute.

Nevertheless, petitioner is not entitled to the dismissal of the SVP petition. As the Third District Court of Appeal also properly determined, the Board's issuance of the 45-day hold in reliance on regulation 2600.1(d) was the result of a good faith mistake of law under section 6601, subdivision (a)(2). The Court of Appeal's decision should be affirmed.

ARGUMENT

I. THE "GOOD CAUSE" REQUIREMENT OF SECTION 6601.3 IS A SHOWING THAT, DUE TO EXIGENT CIRCUMSTANCES, IT IS DIFFICULT OR IMPOSSIBLE TO COMPLETE THE SVP EVALUATION WITHIN THE STATUTORY TIME FRAME

This Court has asked what constitutes "good cause" for the imposition of a 45-day hold under section 6601.3 to permit evaluation of the defendant under the Act? Section 6601.3 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.

As discussed in detail below, based on legislative intent and in order to prevent an interpretation which would render an act of the Legislature meaningless, "good cause" in this statute requires a showing that, due to exigent circumstances, such as when an inmate's release date is unexpectedly moved up, or where there is a shorter parole revocation term, it is difficult or impossible to timely complete a full evaluation of an inmate under section 6601, subdivisions (c) through (i), prior to the inmate's EPRD.

The meaning of the phrase "good cause" as used in section 6601.3 is a question of law involving statutory interpretation and is reviewed under a standard of independent review. (*People v. Jones* (2001) 25 Cal.4th 98, 107-108; *City of Saratoga v. Hinz* (2004) 115 Cal.App.4th 1202, 1212 ["the interpretation of a statute and the application of that statute to undisputed facts . . . is subject to this court's independent or de novo review"]; see also *International Alliance of Theatrical Stage Employees, etc. v. Laughon* (2004) 118 Cal.App.4th 1380, 1387 [interpretation and application of statutes is a matter of independent review].)

A. Under The Law Governing Statutory Interpretation, The "Good Cause" Requirement In Section 6601.3 Was Intended To Apply To Situations Such As An Adjusted EPRD Or Short Parole Revocation Term Which Prevented Timely Completion Of The SVP Evaluation

In determining what constitutes "good cause" for the imposition of a 45-day hold under section 6601.3, the statute must be examined using the well-established rules of statutory interpretation. "'In construing a statute, our role is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we must look first to the words of the statute because they are the most reliable indicator of legislative intent. [Citation.]'" (*People v. Brookfield* (2009) 47 Cal.4th

583, 592, quoting *People v. Lopez* (2003) 31 Cal.4th 1051, 1056.) The statute's words are given "a plain and commonsense meaning." (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) "If the statutory language is clear and unambiguous, the plain meaning of the statute governs. [Citation.]" (*People v. Lopez*, *supra*, 31 Cal.4th at p. 1056.)

> But the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. An interpretation that renders related provisions nugatory must be avoided; each sentence must be read not in isolation but in the light of the statutory scheme; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed.

(*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, citations omitted.)

This Court has further stated that, "[w]hen the plain meaning of the statutory text is insufficient to resolve the question of its interpretation, the courts may turn to rules or maxims of construction 'which serve as aids in the sense that they express familiar insights about conventional language usage.'" (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663, quoting 2A Singer, Statutes and Statutory Construction (6th ed. 2000) § 45:13, p. 107.)

> '"When the language is susceptible of more than one reasonable interpretation . . ., we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part."' [Citation.]

(*People v. Jefferson* (1999) 21 Cal.4th 86, 94.) "Using these extrinsic aids, we '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.' [Citation.]" (*People v. Sinohui* (2002) 28 Cal.4th 205, 211-212.) "Finally, the court may consider the impact of an interpretation on public policy, for '[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.'" (*Mejia v. Reed*, *supra*, 31 Cal.4th at p. 663, quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) The court should apply "reason, practicality, and common sense to the language at hand." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239.)

In examining the plain meaning of the term "good cause," it has been observed that, "[t]he term 'good cause' is not susceptible of precise definition. In fact, its definition varies with the context in which it is used. Very broadly, it means a legally sufficient ground or reason for a certain action." (*Zorrero v. Unemployment Ins. Appeals Bd.* (1975) 47 Cal.App.3d 434, 439.) "[T]he concept of good cause is 'relative'; its existence depends on the particular circumstances of each case." (*American Contract Services v. Allied Mold & Die, Inc.* (2001) 94 Cal.App.4th 854, 862, citing *Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994.) The court in *Cal. Portland Cement Co. v. Cal. Unemp. Ins. Appeals Board* (1960) 178 Cal.App.2d 263, 272-273 (*Cal. Portland*), quoted from *Bliley Electric Co. v. Unemployment Comp. Board of Review* (1946) 158 Pa.Super. 548, 45 A.2d 898, as follows:

> "Of course, 'good cause' and 'personal reasons' are flexible phrases, capable of contraction and expansion, and by construction, all meaning can be compressed out of them or they may be expanded to cover almost any meaning. Reducing them

> to a fixed, definite and rigid standard, if desirable, is necessarily difficult, if not impossible. However, in whatever context they appear, they connote, as minimum requirements, real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate excuses that will bear the test of reason, just grounds for action, and always the element of good faith. . . ."

Various cases have interpreted the phrase "good cause" to mean different things depending on the use of the phrase within the statutory language. "When related to the context of the statute, 'good cause' takes on the hue of its surroundings, and it . . . must be construed in the light reflected by its text and objectives." (*Cal. Portland*, *supra*, 178 Cal.App.2d at p. 273.) For example, in *In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, the court looked at, as a matter of first impression, the meaning of "good cause" as that phrase is used in Family Code section 3653, subdivision (b).[8] Under that statute, if a court modifies or terminates a support order because of a party's unemployment, the trial court must make its order retroactive unless it finds good cause to deny retroactivity and specifies its reasons. The statute does not define "good cause" justifying a trial court's denial of retroactivity. The *Leonard* court looked at the phrase "good cause" as used in various contexts by several different courts but ultimately adopted the language of *Cal. Portland*, concluding

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[8] Family Code section 3653, subdivision (b), states:

> If an order modifying or terminating a support order is entered due to the unemployment of either the support obligor or the support obligee, the order shall be made retroactive to the later of the date of the service on the opposing party of the notice of motion or order to show cause to modify or terminate or the date of unemployment, subject to the notice requirements of federal law (42 U.S.C. Sec. 666(a)(9)), unless the court finds good cause not to make the order retroactive and states its reasons on the record.

that good cause under Family Code section 3653, subdivision (b), "requires the court to make a good faith finding that nonretroactivity is justified by '"real circumstances, substantial reasons, [and] objective conditions."'" (*Id.* at p. 559.) It held that a determination of good cause must give due consideration to the statutory principles concerning child support, that is, balancing the needs and hardship to the children against the interests of the supporting parent in not having an unjust and unreasonable financial burden from a nonretroactive order, with the primary focus being to ensure, if possible, that children actually receive fair, timely, and sufficient support. (*Id.* at p. 560.)

In *Block v. Superior Court* (*Downey*) (1998) 62 Cal.App.4th 363, the court considered the meaning of the phrase in Penal Code section 4004, which permits the release of a county jail inmate for "good cause" where a well-known actor sought release to complete a film. Section 4004 mandates that a prisoner committed to the county jail must be actually confined in the jail until legally discharged.[9] However, the statute also

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[9] Penal Code section 4004 provides in pertinent part:

> A prisoner committed to the county jail for examination, or upon conviction for a public offense, must be actually confined in the jail until legally discharged; and if the prisoner is permitted to go at large out of the jail, except by virtue of a legal order or process, it is an escape; provided, however, that during the pendency of a criminal proceeding, the court before which said proceeding is pending may make a legal order, good cause appearing therefore, for the removal of the prisoner from the county jail in custody of the sheriff. In courts where there is a marshal, the marshal shall maintain custody of such prisoner while the prisoner is in the court facility pursuant to such court order. The superior court of the county may make a legal order, good cause appearing therefore, for the removal of prisoners confined in the county jail, after conviction, in the custody of the sheriff.

provides that, "during the pendency of a criminal proceeding, the superior court . . . may make a legal order, good cause appearing therefore, for the removal of the prisoner from the county jail in custody of the sheriff." The court determined that "[u]nderlying a release order requiring police supervision is that such an order necessarily infringes upon a law enforcement agency in the lawful discharge of its responsibility to maintain the custody of prisoners committed to the agency's jail." (*Id.* at p. 370.) It found that, "[i]mplicit in the 'good cause' requirement of section 4004 is that such orders will only be issued in exceptional circumstances, and then only rarely." (*Ibid.*) The court listed several factors to be considered in issuing a release order, including whether the inmate is likely to pose a danger to the public, whether the inmate has followed jail rules and regulations, and the nature of the activity for which release is sought. (*Ibid.*)

Even in the absence of a statutory scheme, the examination of the meaning of good cause involves a balancing of interests. In the context of a wrongful discharge action involving an implied-in-fact agreement not to terminate except for good cause, it has been determined that "[i]n deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. [Citations.]" (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994, overruled on other grounds in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 351.) For example, this Court in *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, a wrongful discharge case, looked at the issue of what the jury must decide in evaluating a defense based on employee misconduct. (*Id.* at p. 101.) The court held that the jury's function is not to determine whether the plaintiff-employee actually engaged in misconduct, but whether the defendant-employer was objectively reasonable in concluding

that the employee had done so. (*Id.* at p. 103.) It defined good cause in this context as "fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual." (*Id.* at pp. 107-108.) This included "[a] reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation . . . ." (*Ibid.*)

These cases demonstrate that review of the phrase "good cause" involves an examination of the statutory scheme or laws which utilize the phrase and includes a balancing of statutory principles and intent in using the phrase against pertinent competing interests. While a precise definition of good cause applicable to all situations may be impracticable, the legislative history of section 6601.3 provides ample evidence that the Legislature intended that the phrase be interpreted in such a way as to require a showing that exigent circumstances made it difficult if not impossible to timely complete the full SVP evaluation under section 6601.

Looking at the SVPA as a whole, the Legislature's stated purpose in enacting the SVPA is, in part, as follows:

> The Legislature finds and declares that a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders can be identified while they are incarcerated. These persons 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. The Legislature further finds and declares that it is in the interest of society to identify these individuals prior to the expiration of their terms of imprisonment. It is the intent of the Legislature that once identified, these individuals, if found to be likely to commit acts of sexually violent criminal behavior beyond a reasonable doubt, be confined and treated until such time that it can be determined that they no longer present a threat to society.

(Stats. 1995, ch. 763, § 1, p. 5921.) As noted by the Third District Court of Appeal, however, persons identified as potential sexually violent predators, like other prisoners, have a legitimate liberty interest in being released from

incarceration upon the expiration of their determinate term of imprisonment. Penal Code section 3000 specifies that, under the determinate sentencing law, an inmate shall be released on parole at the expiration of his or her term of imprisonment.[10] (Pen. Code, § 3000, subd. (b)(2); Cal. Code Regs., tit. 15, § 3075.2 ["Inmates shall not be retained beyond their discharge date."].) "[A]lthough the Legislature has vested the Board [of Prison Terms] with broad power both to impose conditions of parole and to revoke parole, it has also decreed that the Board has no discretion to withhold parole to a prisoner who has served a determinate term." (*Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 878.)

In keeping with the requirement that prisoners whose determinate terms of imprisonment have expired must be released on parole, the SVPA provides that if the CDCR determines that an inmate may be an SVP, it shall refer the person for evaluation "at least six months prior to that individual's scheduled date for release from prison," unless he was received with less than nine months remaining on his sentence or his release date was modified, in which case the six-month minimum does not apply.[11] (§ 6601, subd. (a)(1).) Within this timeframe, the statute allows for referral to DMH for a "full evaluation" if the CDCR finds the prisoner is likely to be

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[10] Penal Code section 3000, subdivision (b)(2), states in full:

> At the expiration of a term of imprisonment of one year and one day, or a term of imprisonment imposed pursuant to Section 1170 or at the expiration of a term reduced pursuant to Section 2931 or 2933, if applicable, the inmate shall be released on parole for a period not exceeding three years, except that any inmate sentenced for an offense specified in paragraph (3), (4), (5), (6), (11), or (18) of subdivision (c) of Section 667.5 shall be released on parole for a period not exceeding 10 years, unless a longer period of parole is specified in Section 3000.1.

[11] This six-month time requirement did not apply during the first year the law was operative. (§ 6601, subd. (j).)

an SVP. (*Id.*, subd. (b).) The prisoner must then be evaluated by at least two mental health professionals designated by the DMH director. (*Id.*, subds. (c) & (d).) If at least two evaluators agree that the prisoner "has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody" (*id.*, subd. (d)), the DMH director transmits a request for a civil commitment petition to the county where the prisoner was last convicted. (*Id.*, subds. (d)-(h).) Thereafter, if the county's designated attorney concurs in the request, he or she can file a petition for commitment in the superior court. (*Id.*, subd. (i).)

The purpose of the SVPA in protecting the safety of the public by identifying and confining SVPs until they are no longer a threat must be balanced against an inmate's right to be released from incarceration once his or her prison term has expired. To allow the Board to place a 45-day hold on a potential SVP and continue the inmate's confinement beyond his release date without adequate justification would deny an inmate this important liberty interest. In order to protect the inmate's liberty interest, the law provides that the Board must make a showing of "good cause" for continued confinement. (§ 6601.3.) The history of the statute itself confirms that "good cause" must take the form of exigent circumstances. As initially enacted in 1996, section 6601.3 was intended to provide the Board the ability to order a person who may be an SVP to remain in custody for no more than 45 days past the release date for the purposes of completing the full evaluation. At this time, the statute read,

> (a) 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 for full evaluation pursuant to subdivisions (c) to (h), inclusive, of Section 6601, unless his or her scheduled date of release falls more than 45 days after referral.

It appears the Legislature believed 45 days would be sufficient for DMH to complete a full evaluation under the Act and that the Board could issue a hold on an inmate or parolee if less than 45 days remained for the full evaluation. The statute also had a sunset provision which would cause the section to be repealed as of January 1, 1998. In 1997, Senate Bill 536 included an effort to continue the provisions of section 6601.3. At that time, an analysis by the Assembly Committee on Public Safety indicated that,

> As proposed to be amended, this bill continues in effect provisions added by AB 1496 to permit the 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 credits to the person's term of imprisonment renders the normal time frames for SVP commitment impracticable.*

(Assem. Com. on Public Safety, Analysis of Sen. Bill No. 536 (1997-1998 Reg. Sess.), July 8, 1997, p. 4, italics added.) This analysis indicates that the Legislature intended all along for the 45-day hold of section 6601.3 to be imposed in circumstances which rendered it impracticable to complete the SVP evaluation under the time constraints of section 6601. Thus, the statute was reenacted in the same form in 1998.

In 2000, SB 451 was introduced to amend section 6601.3 to add the requirement of a showing of good cause. An analysis of the bill articulated that the amendment to the 45-day hold was intended to,

> clarif[y] that an inmate referred to the SVP process may be detained 45 days beyond the scheduled release date, in order to cover situations in which an inmate's release date may be unexpectedly moved up, or when a parole revocation term allows insufficient time to complete the evaluation process.

(Assem. Com. on Appropriations, Analysis of Senate Bill No. 451 (1999-2000 Reg. Sess.), April 12, 2000, pp. 1-2.) By enacting the amendment, the Legislature recognized that there are situations, such as a change in an

inmate's release date or a short parole revocation term, in which the SVP evaluation cannot be completed before an inmate's scheduled release date. The addition of the phrase "good cause" clarified existing policy that under such exigent circumstances a 45-day hold is proper and necessary to ensure that DMH can timely complete the SVP evaluation. The purpose of the hold provided in section 6601.3 is to ensure that DMH has at least 45 days to complete the full evaluation of the inmate before the inmate is released from custody and before its recommendation is forwarded to the county's designated counsel. The legislative history demonstrates that section 6601.3, as enacted, was intended to apply to situations in which exigent circumstances make it difficult if not impossible to complete the SVP evaluation within the statutory time frame. This is the only fair and logical interpretation of the meaning of the term "good cause" as used in section 6601.3 since the meaning of the term "must be so interpreted that the fundamental purpose of the legislation shall not be destroyed. [Citation.]" (*Cal. Portland*, *supra*, 178 Cal.App.2d at p. 272.)

B. Interpreting The "Good Cause" Requirement In Section 6601.3 To Apply To Situations Such As An Adjusted EPRD Or Short Parole Revocation Term Which Prevent Timely Completion Of The SVP Evaluation, Rather Than As Defined By Regulation 2600.1(d), Avoids an Interpretation Which Would Defeat the Purpose of the Statute

Regulation 2600.1(d) purports to define the phrase "good cause" in section 6601.3. Regulation 2600.1(d) 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, or threatening to retaliate in the future against the victim or any other person on, before, or after January 1, 1996, which resulted in a conviction or a finding of not guilty by reason of insanity of one or more felony violations of the following Penal Code Sections: 261, 262, 264.1, 269, 286, 288, 288(a), 288.5, 289 or any felony violation of sections 207, 209 or 220, committed with the intent to commit a violation of sections 261, 262, 264.1, 286, 288, 288a, or 289. The preceding felony violations must be against one or more victims.
>
> If the victim of one of the felony violations listed above is a child under 14, then it is considered a sexually violent offense.
>
> A prior finding of not guilty by reason of insanity for an offense described in this subdivision, a conviction prior to July 1, 1977 for an offense described in this subdivision, a conviction resulting in a finding that the person was a mentally disordered sex offender, or a conviction in another state for an offense that includes all of the elements of an offense described in this subdivision, shall also be deemed to be a sexually violent offense, even if the offender did not receive a determinate sentence for that prior offense.
>
> (2) Some evidence that the person is likely to engage in sexually violent predatory criminal behavior.

The definition of good cause in the regulation tracks the statutory definition of an SVP set forth in section 6600. In subdivision (a)(1) of section 6600 (section 6600(a)(1)), an SVP is defined as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." The definition of a sexually violent offense in subdivision (1) of regulation 2600.1(d) is substantially the same as that provided in section 6600, subdivisions (a) and (b), and the requirement that the person is likely to engage in sexually violent predatory criminal behavior in subdivision (2) of regulation 2600.1(d) is the same as that found in section 6600, subdivision (a)(1). The regulation lacks only the element of a diagnosed mental disorder present in section 6600, subdivision (a)(1), but this omission in the regulation does not alter the analysis. This is so because the showing required by the regulation is necessarily included in the broader definition of SVP found in section 6600(a)(1). Essentially, the definition of "good cause" in regulation 2600.1(d) is the existence of some evidence that the inmate or parolee in revoked status may be an SVP.

A 45-day hold under section 6601.3 may be issued for "a person referred to the State Department of Mental Health pursuant to subdivision (b) of section 6601 . . . ." Accordingly, such a person necessarily has been screened by CDCR and "as a result of this screening it is determined that the person is likely to be a sexually violent predator." (§ 6601, subd. (b).) Therefore, according to section 6601.3, a 45-day hold may be issued for a person who is likely to be a sexually violent predator and who has already been referred to DMH for a full evaluation under section 6601, subdivisions (c) through (i). Based on the definition of good cause provided by regulation 2600.1(d) then, the required showing of good cause in section 6601.3 is simply a showing of some evidence that the person may be an

SVP, a showing which necessarily exists in every case in which a 45-day hold is issued since it has already been determined that the inmate or parolee is likely to be an SVP. A showing that a person is likely to be an SVP must be based on the lesser showing of "some evidence" that the person may be an SVP. Consequently, the requirement of a showing of good cause as defined by regulation 2600.1(d) is simply redundant. It is incontrovertible that under the regulation's interpretation of good cause, no exigent circumstance is required, and the showing of good cause is always met. The Third District Court of Appeal aptly summed up the dilemma this way:

> As a general matter, an exception to a general rule that requires good cause as its trigger is just that - an *exception* - and should apply only in *exceptional* cases. [Citation.] That an inmate being evaluated under the act as a potential sexually violent predator may be a sexually violent predator is hardly exceptional. As we have noted, the evaluation process is triggered only when the secretary of corrections determines an inmate "may be a sexually violent predator." (§ 6601, subd. (a)(1).) Presumably this determination is not made arbitrarily, but instead is based on some evidence. [Citation.] Similarly, a full evaluation is warranted only if the preliminary screening results in a determination that "the person is likely to be a sexually violent predator." (§ 6601, subd. (b).) Again, presumably this determination is not made arbitrarily but is based on some evidence.
>
> What that means is that by the time a person has been referred to mental health for a full evaluation, it has been determined already, based on some evidence, that the person not only may be, but is likely to be, a sexually violent predator. If the board legitimately could find good cause for a 45-day hold under section 6601.3 based solely on a showing of some evidence that the person being evaluated (or to be evaluated) was convicted of a sexually violent offense and is likely to engage in sexually violent predatory criminal behavior-as regulation 2600.1 permits - then good cause for a hold would exist in *every* case referred for a full evaluation, and the exception would swallow the rule.

(*Lucas*, Slip Opn. at pp. 17-18.)

As stated above, the phrase "good cause" is capable of contraction and expansion, and "all meaning can be compressed out of [it] . . ." (*Cal. Portland*, *supra*, 178 Cal.App.2d at p. 272.) Regulation 2600.1(d) does just that. The substantive effect of the regulation is to strip all meaning from the phrase as it was intended to be used in section 6601.3. The Legislature clearly did not intend for a 45-day hold in section 6601.3 to apply in all cases where there was some evidence an inmate may be an SVP. Following the interpretation of good cause as set forth in the regulation would render mere surplusage the term good cause as used in section 6601.3. Courts always seek to avoid such a construction of the statutory language. (*Estate of McDonald* (1990) 51 Cal.3d 262, 269-270.)

C. S.B. 1201 Provides Further Evidence That The Good Cause Requirement Means A Showing That Due To Exigent Circumstances It Is Difficult Or Impossible To Complete The SVP Evaluation Within The Statutory Time Frame

In further support of respondent's position, on September 30, 2010, Governor Schwarzenegger signed into law as non-urgency legislation Senate Bill 1201. This law amends section 6601.3 to provide the meaning of good cause as it pertains to this statute. Section 6601.3, as amended by SB 1201, will read as follows:

> (a) 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.
>
> (b) For purposes of this section, good cause means circumstances where there is a recalculation of credits or a restoration of denied or lost credits, a resentencing by a court, the receipt of the prisoner into custody, or equivalent exigent

circumstances which result in there being less than 45 days prior to the person's scheduled release date for the full evaluation described in subdivisions (c) to (i), inclusive, of Section 6601.

While respondent recognizes that this legislative amendment comes after the issue arose in *Lucas* and *Sharkey*, the subsequent action by the Legislature is further evidence that the purpose and intent of the Legislature in including the good cause requirement for a 45-day hold in section 6601.3 was to provide additional time to DMH in situations where exigent circumstances occurred making it difficult or impossible to timely complete the full evaluation. The new law will require a showing of exigent circumstances which resulted in DMH having less than 45 days before an inmate's EPRD to complete the full evaluation required by section 6601, subdivisions (c) through (i).

D. The "Exceptional Circumstances" Requirement In Subdivision (a) of Regulation 2600.1 Does Not Apply To 45-Day Holds Issued Pursuant To Section 6601.3

Petitioner adopts the argument of petitioner Sharkey that California Code of Regulations, title 15, section 2600.1 should be read as a whole. (*Sharkey* OBM at pp. 20-26.) He contends that as found in subdivision (a) of the regulation, there is a threshold requirement that "exceptional circumstances" exist prior to a determination of good cause in which "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."[12] (OBM at p. 19.) Petitioner did not raise this contention at any point in the prior proceedings. He does so now in an attempt to bolster his contention that his unlawful custody was not the result of the

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[12] The text of regulation 2600.1(a) will be set forth, *post*, in this section of the Answer Brief.

Board's good faith mistake of law.[13] Because petitioner did not present this argument below, he has forfeited the argument on review by this Court. (*People v. Redd* (2010) 48 Cal.4th 691, 747; *People v. Randle* (2005) 35 Cal.4th 987, 1001-1002; see also *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 885, 902, fn. 5.) Regardless, petitioner's interpretation of the regulation is incorrect.

A court examines a regulation utilizing the same standards as applied in cases of statutory construction and interpretation. (*Cal. Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 292; *Head v. Civil Service Com.* (1996) 50 Cal.App.4th 240, 243.) These standards are set forth in Argument IA, *ante*. Although the intent ultimately prevails over the letter of the law, the language of the regulation may be sufficiently clear and unambiguous to obviate the need for further inquiry. (*Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 866.)

Petitioner's contention presents an issue of regulatory construction concerning the meaning of regulation 2600.1, which provides 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 by the

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[13] Petitioner contends in Argument II of his Opening Brief that if the Board intended the exceptional circumstances provision to apply to 45-day holds and then issued a hold where such circumstances did not exist, the Board must have been acting in bad faith. (OBM at pp. 23-26.)

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. The preceding felony violations must be against one or more victims.

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

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

offense, even if the offender did not receive a determinate sentence for that prior offense.

> (2) Some evidence that the person is likely to engage in sexually violent predatory criminal behavior.
>
> (e) Holds imposed under this section shall start the day following the scheduled release date of the inmate or parolee in revoked status and will terminate no later than the 45th day following the scheduled release date. Holds shall terminate sooner if the person is not referred to the Department of Mental Heath as a result of the screening process or upon a determination by the Department of Mental Health that the person is not a sexually violent predator or upon superior court decisions pursuant to Welfare and Institutions Code sections 6601.5 or 6602.
>
> (f) The parole period of any person found to be a sexually violent predator shall be tolled until that person is found no longer to be a sexually violent predator, at which time the period of parole or any remaining portion thereof shall begin to run.

Simply stated, the plain meaning of subdivision (a) of regulation 2600.1 (regulation 2600.1(a)) is that the existence of exceptional circumstances is a prerequisite to a temporary, three-day hold. The regulation does not state that exceptional circumstances are a prerequisite to a 45-day hold, which instead requires a showing of good cause.[14] The

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[14] It appears that the regulation contemplates the imposition of a temporary, three-day hold, followed by a 45-day hold pursuant to section 6601.3. This interpretation is corroborated by the final sentence in subdivision (b) of the regulation which states, "The good cause determination by the board pursuant to subdivisions (c) and (d) of this section [for a 45-day hold under section 6601.3] must occur within the time period of the temporary hold." Petitioner agrees with this assessment, stating, "It is apparent that subsections (a), (b), (c), and (d) were meant to be read together and to outline a single process." (OBM at p. 25.) This process did not occur in this case; the Board did not issue a three-day temporary hold on
(continued...)

Board did not issue a temporary three-day hold in this matter, so regulation 2600.1(a) and its provision for exceptional circumstances, is not applicable to this case.

If the drafters of regulation 2600.1 had intended the exceptional circumstances requirement to apply to 45-day holds, they no doubt would have included such language in subdivision (d) itself. In fact, in looking at the version of the regulation in effect in 1996, and comparing it to the current version of the regulation, it is apparent that, as originally drafted, the exceptional circumstances requirement initially did apply to both three-day holds and 45-day holds. (Register 96, No. 39, 9-27-96.) At that time, subdivision (a) provided that the overall purpose of the regulation was the screening of potential SVPs "where exceptional circumstances preclude an earlier evaluation and judicial determination of probable cause (Welfare & Institutions Code section 6602) prior to return to custody or release on parole." (*Ibid.*) The regulation went on to allow for a temporary 3-day hold in subdivision (b) and a 45-day hold in subdivision (c). (*Ibid.*) In 2007, the regulation was amended to its current form, and exceptional circumstances are specifically required only for a three-day hold. (Register 2007, No. 16, 4-20-07.) In 2007, the drafters also amended subdivision (d) to include the definition of "good cause" as used in section 6601.3. The amendment to the regulation shows that the exceptional circumstances requirement in subdivision (a) of the regulation does not apply to 45-day holds.

(...continued)

petitioner under subdivision (a) of the regulation. Rather, the Board imposed a 45-day hold only, and the definition of good cause as required by section 6601.3 is provided only by subdivision (d) of the regulation. Therefore, only subdivision (d) of regulation 2600.1 is at issue in this case.

II. CALIFORNIA CODE OF REGULATIONS, TITLE 15, SECTION 2600.1, SUBDIVISION (d) IS NOT A VALID REGULATION

The next question to be addressed is whether regulation 2600.1(d), which defines the term "good cause" as used in section 6601.3 as some evidence that the inmate has a prior qualifying conviction and is likely to engage in predatory criminal behavior, is a valid regulation. Because the definition of good cause in regulation 2600.1(d) is inconsistent with legislative intent and impairs the scope of section 6601.3 by divesting the phrase of meaning, the regulation is invalid.

Issues of statutory and constitutional interpretation raise pure questions of law, subject to independent appellate review. (*Slocum v. State Board of Equalization* (2005) 134 Cal.App.4th 969, 974.) Administrative agencies have only the powers conferred on them, either expressly or impliedly, by the Constitution or by statute, and administrative actions exceeding those powers are void. (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1042.) To be valid, an administrative regulation must be within the scope of authority conferred by the enabling statutes. (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 680; *Morris v. Williams* (1967) 67 Cal.2d 733, 748.) The general standard of review for determining the validity of an administrative regulation is found in Government Code section 11342.2. That section states:

> Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless [1] consistent and not in conflict with the statute and [2] reasonably necessary to effectuate the purpose of the statute.

The standard of consistency in Government Code section 11342.2 means "being in harmony with, and not in conflict with or contradictory to,

existing statutes, court decisions, or other provisions of law." (Gov. Code, § 11349, subd. (d).) "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations. [Citations.]" (*Morris v. Williams* (1967) 67 Cal.2d 733, 748.) No matter how altruistic its motives, an administrative agency has no discretion to promulgate a regulation that is inconsistent with the governing statutes. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 419 (*Agricultural Labor Relations Bd.*).)

This Court has explained that regulations may be either quasi-legislative or interpretive in nature, although "administrative 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." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 6, fn. 3 (*Yamaha*).) The quasi-legislative rules are afforded the dignity of statutes. Review of such rules is narrowly confined to determining whether the regulation (1) comes within the scope of the controlling statute and (2) is reasonably necessary to carry out the statutory purpose. (*Id.* at pp. 10-11; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 800.) However, courts do have the last word when it comes to "deciding whether a regulation lies within the scope of the authority delegated by the Legislature." (*Yamaha, supra*, 19 Cal.4th at p. 11, fn. 4.) In short, agencies do not have discretion to promulgate regulations that are inconsistent with the governing statute, or that alter or amend the statute or enlarge its scope. (*Ontario Community Foundations, Inc. v. State Bd. of Equalization* (1984) 35 Cal.3d 811, 816-817.)

Looking at regulation 2600.1 as a quasi-legislative regulation, the enabling authorities for the regulation are Penal Code sections 3052 and 5076.2. Penal Code section 5076.2 requires that any regulations

promulgated by the Board shall be promulgated pursuant to the Administrative Procedures Act (Gov. Code, § 11340 et seq.) (APA). Section 3052 states:

> The [Board] shall have 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.

Respondent does not dispute the general proposition that regulation 2600.1(d) comes within the scope of duties delegated to the Board through Penal Code section 3052 in that the regulation attempts to define "good cause" for the purpose of section 6601.3, thus establishing a regulation governing the eligibility and release on parole for those in custody in a prison. However, in examining the second factor used to review the validity of a quasi-legislative regulation, regulation 2600.1 is not valid; the regulation is not "reasonably necessary to carry out the statutory purpose." As explained in detail in Argument I, *ante*, the definition of "good cause" as set forth in the regulation is superfluous and adds nothing to the substantive showing required for the Board to issue a 45-day parole hold under section 6601.3. If a 45-day hold could be based on a showing of some evidence that the inmate may be an SVP then good cause for a hold would exist in every case where an inmate is referred for a full evaluation. In that case, the exception would swallow the rule. Respondent submits that while a legally correct definition of good cause as used in section 6601.3 may be reasonably necessary in theory, the definition of good cause as stated in regulation 2600.1(d) is in conflict with the legislative intent of the statute and alters the scope of the statute. It therefore is not reasonably necessary.

Regarding interpretive regulations, an agency's expertise with respect to pertinent legal and regulatory issues lends presumptive value to such

regulations. Nonetheless, agency interpretations have been determined to be nothing more than legal opinions freighted with a diminished power to bind. (*Yamaha*, *supra*, 19 Cal.4th at p. 11.) Factors demonstrating that an agency's interpretation of a given statute is probably correct include evidence that the agency consistently followed the interpretation in question, and the interpretation was contemporaneous with enactment of the statute subject to interpretation. (*Id.* at pp. 12-13.) Judicial deference is more deserving under circumstances indicating that the interpretation was part of a regulation adopted by the agency in accordance with the APA, rather than contained in an advice letter prepared by a staff member. "However, even formal interpretive rules do not command the same weight as quasi-legislative rules." (*Id.* at p. 13.) The final construction of a statute rests with the courts, and in exercising that power the courts accord weight to an administrative interpretation based on the particular context. (*Id.* at p. 12.) Should regulation 2600.1(d) be determined to be an interpretive regulation, it appears that the regulation is presumptively correct as held by the *Sharkey* court. The Board promulgated the regulation in accordance with APA procedures. There is no evidence to suggest that the Board has not consistently followed its interpretation of the meaning of good cause as set forth in regulation 2600.1(d).

Nevertheless, even if regulation 2600.1 is considered valid if viewed as quasi-legislative and is therefore entitled to deference as an interpretive regulation, the core problem with the regulation remains. The Board has no discretion to promulgate a rule which conflicts with the very statute it claims to interpret. In other words, even if regulation 2600.1(d) comes within the scope of authority conferred by Penal Code sections 3052 and 5076.2 and is entitled to deference, it still must be found invalid because it conflicts with section 6601.3. Where an agency action is consistent with its authorizing statutes, the action may still be deemed void if it conflicts with

another statute. (*Agricultural Labor Relations Bd.*, *supra*, 16 Cal.3d at p. 419 ["'Administrative regulations that violate acts of the Legislature are void'"]; see also *Tolman v. Underhill* (1952) 39 Cal.2d 708, 712 [regulation may also be invalid where it "attempts to impose additional requirements in a field which is fully occupied by statute"].) As explained by this Court, "[t]he doctrine has been most frequently invoked to strike down administrative regulations in conflict with the statute which created the agency or which the agency is authorized to administer. [Citations.] But the principle is equally applicable when the regulation contravenes a provision of a different statute." (*Agricultural Labor Relations Bd.*, *supra*, 16 Cal.3d at p. 420.) Regulation 2600.1(d) alters and impairs the terms of section 6601.3. It transforms the meaning of the term "good cause" so as to render it essentially meaningless. In short, the definition is inconsistent with the legislative intent of section 6601.3's good cause requirement. Argument I, *ante*, details the fact that regulation 2600.1(d) is completely inconsistent with the meaning of good cause as it is intended in section 6601.3 and impairs the scope of the statute by stripping the meaning from the phrase "good cause." Consequently, the regulation is not valid.

If, on the other hand, as found by the *Sharkey* court, this Court determines that regulation 2600.1(d) is valid and its standard for good cause is proper under either a quasi-legislative or interpretive analysis, this Court should affirm the decision by the trial court that there was no violation of statutory procedure with regard to petitioner's SVP petition. If regulation 2600.1(d) is valid, then the Board complied with the requirement that good cause be shown for a 45-day hold as that term is defined in regulation 2600.1(d), because there was some evidence before the Board of a qualifying offense and some evidence that petitioner was likely to engage in sexually violent predatory behavior. The Sexually Violent Predator Screening form completed December 21, 2007 (Pet. Exh. D), and the

October 7, 2008, letter from the Board to DMH (Pet. Exh. G), both show that petitioner was convicted in 1979 of a lewd and lascivious touching of a child in violation of Penal Code section 288, subdivision (a). The Level II Screen completed October 9, 2008, provides evidence that petitioner was likely to engage in sexually violent predatory criminal behavior in that petitioner was provisionally diagnosed with pedophilia and paraphilia and had various factors associated with the risk of reoffense among sex offenders. (Pet. Exh. H.) Additionally, the Level II Screen recommended that petitioner be referred for full evaluation by DMH. (*Ibid.*) Thus, the record shows that at the time the Board sought the 45-day hold under section 6603.1, the factors of regulation 2600.1(d) were established. Therefore, if this Court determines that regulation 2600.1(d) is valid, good cause was shown by the Board to issue a 45-day hold under section 6601.3, and the SVP petition against petitioner should not be dismissed.

III. PETITIONER'S UNLAWFUL CUSTODY WAS THE RESULT OF A GOOD FAITH MISTAKE OF LAW

A. The Third District Court Of Appeal's Determination That The Board's Issuance Of The 45-Day Hold In Reliance On Regulation 2600.1(d) Was The Result Of A Good Faith Mistake Of Law Was Proper

If petitioner was not in lawful custody when the petition was filed because there was no good cause to issue a 45-day hold under section 6601.3, a point which respondent concedes, the petition nevertheless should not be dismissed. The unlawful custody was the result of a good faith mistake of law pursuant to section 6601, subdivision (a)(2) (section 6601(a)(2)). The Third District Court of Appeal properly found that the Board's issuance of the 45-day hold in reliance on regulation 2600.1(d) was the result of a good faith mistake of law. (*Lucas*, Slip Opn. at p. 25.) The standard of review for a finding of good faith is the substantial evidence

standard of review. (*Langhorne v. Superior Court* (2009) 179 Cal.App.4th 225, 238, citing *People v. Memro* (1995) 11 Cal.4th 786, 831; *Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, 932.) "Because the good faith issue is factual, the question on review is whether the evidence of record was sufficient to sustain the [lower] court's finding." (*Knight v. City of Capitola*, *supra*, 4 Cal.App.4th at p. 932.)

The *Lucas* court correctly identified that the first question to be answered in addressing this issue is whether the Board relied on regulation 2600.1(d) in issuing the 45-day hold on petitioner. It noted that "in a habeas corpus proceeding, the petitioner bears the burden of proving by a preponderance of the evidence the facts that establish a basis for relief. (*In re Cox* (2003) 30 Cal.4th 974, 997-998.)" (*Lucas*, Slip Opn. at p. 34.) The well-established rule is that "it is the petitioner who bears the ultimate burden of proving the factual allegations that serve as the basis for his or her request for habeas corpus relief." (*In re Serrano* (1995) 10 Cal.4th 447, 456.)

Here, petitioner failed to meet his burden in showing that the Board did not rely on regulation 2600.1(d). Although the evidence, including the form used to issue the 45-day hold, does not definitively state whether or not the Board was relying on regulation 2600.1(d) in issuing the hold (Pet. Exh. I), the evidence supports an inference that the Board did rely on the regulation because all of the components of the good cause definition in regulation 2600.1(d) were established when the Board sought the hold and because regulation 2600.1(d) provides the only source of meaning of the phrase "good cause." As set forth above, regulation 2600.1(d) defines good cause under section 6601.3 as existing when there is (1) *some evidence* that an inmate committed a qualifying sexually violent offense, and (2) *some evidence* that the inmate is likely to engage in sexually violent predatory criminal behavior. The Sexually Violent Predator Screening form

completed December 21, 2007 (Pet. Exh. D), and the October 7, 2008, letter from the Board to DMH (Pet. Exh. G), both show that petitioner was convicted in 1979 of a lewd and lascivious touching of a child in violation of section 288, subdivision (a). The Level II Screen completed October 9, 2008, provides evidence that petitioner was likely to engage in sexually violent predatory criminal behavior in that petitioner was provisionally diagnosed with pedophilia and paraphilia and had various factors associated with the risk of reoffense among sex offenders. (Pet. Exh. H.) Additionally, the Level II Screen recommended that petitioner be referred for full evaluation by DMH. (*Ibid.*) Thus, the record shows that at the time the Board sought the 45-day hold under section 6603.1, the requirements of regulation 2600.1(d) were established. Because the evidence demonstrates that all of the factors in regulation 2600.1(d) were met at the time the Board issued the 45-day hold, and because the regulation was the only source of a definition of good cause for the statute, it appears that the Board did in fact rely on the regulation. Additionally, even if this Court rejects such an inference, the fact remains that petitioner has failed to meet his burden in showing that the Board did *not* rely on the regulation in imposing the 45-day hold as required for a habeas petition.

Petitioner argues that because there was no showing of exceptional circumstances as required in subdivision (a) of the regulation, the Board could not have been relying on regulation 2600.1(a). (OBM at p. 23.) Respondent agrees that the Board was not relying on subdivision (a) of the regulation, but for a different reason. The Board did not rely on subdivision (a) because that subdivision is inapplicable to this case. The language of the subdivisions (a) and (b) of the regulation contemplate the imposition of a temporary, three-day hold, followed by a 45-day hold pursuant to section 6601.3. The Board did not issue a temporary three-day hold on petitioner under subdivision (a) of the regulation. The Board

imposed a 45-day hold only. Subdivision (a) of the regulation is inapplicable here.

Second, assuming the Board did rely on regulation 2600.1(d) in issuing the 45-day hold, the issue becomes whether the Board's reliance on regulation 2600.1(d) to issue the hold was a good faith mistake of law. The phrase "good faith" is generally understood "to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. [Citations.]" (*People v. Nunn* (1956) 46 Cal.2d 460, 468.) In other words, good faith is "'a state of mind indicating honesty and lawfulness of purpose: belief in one's legal title or right: belief that one's conduct is not unconscionable. . . . [Citation.]'" (*Pugh v. See's Candies* (1988) 203 Cal.App.3d 743, 764.) The existence of good faith is determined by the circumstances existing at the time of the alleged good faith act, and "not by virtue of hindsight." (*Burch v. Children's Hospital* (2003) 109 Cal.App.4th 537, 548.) "A mistake of law is a mistake occurring when a person knows the facts as they are but has a mistaken belief as to the legal consequence of those facts. Not every mistake is excusable, but an honest mistake is excusable, the determining factor being the reasonableness of the misconception." (*Powell v. City of Long Beach* (1985) 172 Cal.App.3d 105, 109, citations and internal quotation marks omitted.) The defendant bears the burden of showing his custodial status was the result of bad faith. (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1228-1229 (*Hubbart*).)

The governing statute, section 6601(a)(2), provides as follows:

> A petition may be filed under this section if the individual was in custody pursuant to his or her determinate prison term, parole revocation term, or a hold placed pursuant to Section 6601.3, at the time the petition is filed. 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.

(§ 6601, subd. (a)(2); see *Hubbart*, *supra*, 88 Cal.App.4th at pp. 1228-1229 [holding that the deadlines stated in the SVPA are not jurisdictional and appellant was not entitled to dismissal of the petition unless the 45-day hold was ordered in bad faith].) Pursuant to this express good faith exception to the custody requirement, even if this Court finds that at the time the SVP petition was filed petitioner was in custody based on an unlawful 45-day hold, it may only order the petition dismissed if it also determines that the illegal hold was not the result of a good faith mistake of law.

The good faith exception of section 6601(a)(2) was added to the SVPA in 1999 in response to two Court of Appeal cases. In *Terhune v. Superior Court* (*Whitley*) (1998) 65 Cal.App.4th 864 (*Whitley I*), the court considered the validity of a regulation which, like the regulation at issue in this case, had been promulgated by the former Board of Prison Terms. The regulation, California Code of Regulations, title 15, section 2616, former subdivision (a)(7), allowed parole to be revoked for psychiatric treatment when the parolee "'is suffering from a mental disorder which substantially impairs the parolee's ability to maintain himself or herself in the community, or which makes the parolee a danger to himself/herself or others, when necessary psychiatric treatment cannot be obtained in the community.'" (*Id.* at p. 868.) This regulation was used by the Board to revoke the parole of a former prisoner, and during the 12-month revocation period, SVP proceedings were initiated against him. (*Id.* at pp. 870-872.) On appeal, the court held the regulation to be invalid, concluding in essence that it exceeded the Board's authority, inasmuch as the regulation was a means of requiring felons who have served their sentence to remain in custody and receive involuntary treatment for reasons similar to those in the SVPA or the Mentally Disordered Offenders Act (MDO Act; Pen. Code, §

2960 et seq.), but without providing the rigorous due process protections that these statutes require. (*Id.* at pp. 878-880.) The regulation was subsequently repealed on May 10, 1999.

The next year, in *People v. Superior Court* (*Whitley*) (1999) 68 Cal.App.4th 1383 (*Whitley II*), the Court of Appeal addressed the issue of whether the finding that Whitley's parole revocation was unauthorized deprived the trial court of jurisdiction to consider the SVP petition against him. The Court of Appeal determined that the trial court retained jurisdiction to consider the petition even though his parole had been erroneously revoked at the time the petition was filed because the error was due to a mistake of law and there was no indication of negligent or intentional wrongdoing by the Department of Corrections. (*Id.* at pp. 1389-1390.) It explained that:

> As in [*People v. Dias* (1985) 170 Cal.App.3d 756], the record in the present case does not indicate negligent or intentional wrongdoing by the Department of Corrections in revoking Whitleys parole for psychiatric conditions based on section 2616(a)(7). The Department's error in revoking his parole on that basis resulted from its mistake of law concerning the scope of its broad statutory authority to establish and enforce regulations governing parole. Until we decided [*Whitley I*], there was no controlling judicial decision directly on point . . . . Given these factors and in light of the serious public safety purpose underlying the Act, we conclude that despite the department's legal error, the trial court had jurisdiction or power to consider the People's latest petition for Whitley's commitment.

(*Id.* at p. 1390.)

This Court in *In re Smith* (2008) 42 Cal.4th 1251, recognized that the addition of section 6601(a)(2) to the SVP Act was in response to these cases and was intended to adopt a rule similar to the holding in *Whitley II*. (*Id.* at pp. 1260-1261.) The *Smith* court pointed out:

> As the analysis further states: "The issue that generated this bill arose in the context of a mistake of law about the application of psychiatric parole revocations as a means of holding an alleged SVP in custody at the time an SVP petition was filed. Such an error is arguably merely [a] technical error, as an inmate who appears to be an SVP would likely be subject to very rapid proper revocation of parole upon release from custody. Similar problems could arise if a court decision rules that good-faith sentencing credit calculations were made in error. [¶] The Attorney General, the co-sponsor of the bill, notes that this bill should also address analogous mistakes of fact. For example, a simple mistake in arithmetic in the calculation of credits could result in an untimely filing of an SVP petition. The Attorney General argues that such a good-faith error should not result in the release of [an] SVP who presents a substantial danger to the public." [Citation.]
>
> This legislative purpose is reiterated in the Assembly appropriations committee's analysis: 'According to the author and the sponsor, the Attorney General, *this bill ensures that petitions to commit dangerous sex offenders to mental health facilities after their terms have expired cannot be dismissed simply because a judge found a prisoner's term was mistakenly extended.* Correctional officials have had to release potential SVPs after an appellate court recently ruled that prisons could not detain mentally ill prisoners by revoking their parole prior to release.' (Assem. Com. on Appropriations, Analysis of Sen. Bill No. 11 (1999-2000 Reg. Sess.) as amended Apr. 6, 1999, pp. 1-2.)

(*Id.* at p. 1261, italics added.) Therefore, under the good faith exception of section 6601(a)(2), proceedings under the Act may be brought "against those whose initial prison custody was valid, but who might evade SVP commitment due to erroneous parole revocations or extensions of sentence. . . ." (*Id.* at p. 1269.)

Furthermore, in amending section 6601, the Legislature included the following statement:

> SEC. 3 The Legislature finds and declares that paragraph (2) of subdivision (a) of Section 6601 is declaratory of existing law. The Sexually Violent Predator Act authorizes civil

> commitment of persons who pose a danger as a result of a mental disorder if released from custody. Therefore, where a petition for commitment of a sexually violent predator has been filed, *it is not the intent of the Legislature that a person be released based upon a subsequent judicial or administrative finding that all or part of a determinate prison sentence, parole revocation term, or a hold placed pursuant to Section 6601.3, was unlawful.*

(Stats. 1999, ch. 136, § 3, italics added.) Thus, the Legislature has definitively stated that a person being held in custody pursuant to an SVP petition should not be released based solely on a subsequent finding that a 45-day hold under section 6601.3 was unlawful.

Following the amendment to section 6601, the case of *Hubbart, supra*, 88 Cal.App.4th 1202, was decided and is also instructive. In that case, Hubbart was convicted of numerous sex offenses and sentenced to prison in 1982. (*Id.* at p. 1213.) In 1990, he was released on parole. (*Ibid.*) His parole was revoked a few months later, and he was released from prison again in 1993. (*Ibid.*) About a month and a half after his release, although he did not violate the conditions of his release, the Board of Prison Terms revoked his parole for psychiatric treatment, invoking the same regulation utilized by the Board in *Whitley I.* (*Id.* at p. 1214.)

The district attorney filed an SVP petition against Hubbart while he was in prison pursuant to this parole revocation. As noted above, the court in *Whitley I* invalidated California Code of Regulations, title 15, section 2616, former subdivision (a)(7) (regulation 2616(a)(7)), in 1998 (*Whitley I, supra*, 65 Cal.App.4th at p. 868), and it was repealed in 1999. In 2000, Hubbart was committed as an SVP, and on appeal from the order of commitment, Hubbart challenged the validity of his commitment on the grounds that he was not in lawful custody at the time the SVP petition was filed. (*Hubbart, supra*, 88 Cal.App.4th at p. 1228.) The appellate court determined that the error resulted from a mistake of law. (*Id.* at p. 1229.)

At the time the petition was filed, the Act required only that a person alleged to be an SVP be in custody under the jurisdiction of the Department of Corrections, and Hubbart was in custody at the time of the filing of the petition. At the time of Hubbart's parole revocation pursuant to regulation 2616(a)(7), no judicial or administrative decision had addressed the validity of that regulation. "The decision in [*Whitley I*] was not rendered until after the petition to commit defendant had been filed. Thus, defendant has made no showing that his parole was revoked in bad faith." (*Ibid.*) The *Hubbart* court stated:

> Here, as in *Dias* [170 Cal.App.3d 756], the error resulted from a mistake of law. The Department of Corrections relied on a regulation that was apparently valid: at the time, there was no controlling judicial decision directly on point. The regulation was invalidated only after the petition for commitment was filed. There is no evidence of any negligence or intentional wrongdoing here. [Citations.]

(*Id.* at pp. 1229-1230.)

In light of this case law, substantial evidence supports the Court of Appeal's determination that the Board relied on regulation 2600.1(d) to impose the 45-day hold pursuant to section 6601.3, and its reliance on the regulation was a good faith mistake of law. On October 9, 2008, the Board issued a 45-day hold pursuant to section 6601.3, determining that petitioner met the initial screening criteria for SVP proceedings and that the no-bail hold would "facilitate full SVP evaluations to be concluded by the DMH." (Pet. Exh. I.) The recommendation for the hold states that petitioner "meets the initial screening criteria for civil proceedings as [an SVP] pursuant to the Welfare and Institutions Code [WIC] Sections 6600, et seq." (*Ibid.*) At that time, there was no judicial or administrative decision addressing the validity of regulation 2600.1(d) and its definition of good cause. In other words, at the time the Board imposed the 45-day hold under section 6601.3, the regulation was apparently valid. The issue of the validity of regulation

2600.1(d) was first raised in 2010 in *Lucas* and *Sharkey*, well after the hold was placed on petitioner. Based on the *Whitley* and *Hubbart* line of cases discussed above, the reliance by the Board on regulation 2600.1(d), which was only later determined to be invalid in *Lucas*, constitutes a good faith mistake of law pursuant to section 6601(a)(2).

Petitioner seeks to distinguish this case from *Hubbart*. He asserts that in *Hubbart* the court found regulation 2616(a)(7) to be invalid when compared with competing provisions of law and there was no evidence of negligence or intentional wrongdoing. (OBM at pp. 32-33.) He contends that CDCR and/or the Board in this case, by contrast, was negligent for failing to timely process petitioner's SVP screening and for imposing the hold when it knew or should have known it needed to have exceptional circumstances first. (*Ibid.*) Petitioner is wrong on both counts. Because the Board was relying upon the definition of good cause as set forth in regulation 2600.1(d) and because the Board had some evidence that petitioner was an SVP as required by the regulation, it issued the 45-day hold continuing petitioner's confinement. The reasons for CDCR's delay in processing the initial screening of petitioner, which petitioner points to as evidence of negligence or intentional wrongdoing, were irrelevant to the Board's determination of whether a 45-day hold should issue under the regulation. (See Argument III B, *post.*)

Furthermore, petitioner's attempt to distinguish *Hubbart* on the basis that CDCR and the Board knew or should have known they needed exceptional circumstances also fails. For the first time during the course of this case, petitioner argues that the Board could not have been acting in good faith in relying on the regulation because CDCR, of which the Board is a part, proposed section 6601.3 to the Legislature in the first place. (OBM at pp. 26-28.) Petitioner has adopted this argument from petitioner in *Sharkey* as set forth in the Opening Brief in that case. (*Sharkey* OBM at

p. 27.) Although he objected to the finding that the Board's imposition of the 45-day hold was the result of a good faith mistake of law, petitioner did not specifically argue at any point below that the Board could not have been acting in good faith because CDCR sponsored the amendment to section 6601.3 in 2000 which added the good cause requirement and because CDCR, and therefore the Board, was aware that the holds were designed to be imposed only in cases where exceptional circumstances existed. Because petitioner did not present this argument below, he has forfeited the argument on review by this Court. (*People v. Redd*, *supra*, 48 Cal.4th at p. 747; *People v. Wilson* (2008) 44 Cal.4th 758, 790, fn. 6.) The People were not put on notice of this assertion below and were therefore not given the opportunity to respond and offer evidence in opposition.[15] Petitioner's argument should be denied because his failure to raise the argument until now has forfeited its review by this Court.

Even assuming petitioner had preserved his argument for review, the argument lacks merit. Prior to its 2006 amendment, the SVPA required that, to be eligible for commitment as an SVP, a person must have suffered a conviction of a sexually violent offense against two or more victims (§

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[15] In his Opening Brief on the Merits, petitioner cites in support of this argument evidence which he submitted as exhibits to his Traverse in the Court of Appeal. These exhibits include Enrolled Bill Reports from CDCR recommending the governor sign into law the various bills passed by the state senate and assembly enacting and amending section 6601.3, including AB 1496, SB 536, and SB 451. (Traverse, Exhibits A, E, G, and H.) Petitioner used these exhibits to argue in his Traverse that the Legislature intended 45-day holds to be issued only where, due to circumstances beyond the control of CDCR, the SVP evaluation process could not be completed prior to the inmate's EPRD. (Traverse at pp. 4-7.) Petitioner did not use the exhibits to assert in the Court of Appeal that CDCR, and therefore the Board, should have known that exceptional circumstances were required for a 45-day hold under the doctrine of respondeat superior, as he does here.

6600, subd. (a)(1), as amended by Stats. 2000, ch. 643, § 1) and it did not include violations of Penal Code section 220 in its definition of the term "sexually violent offense" (§ 6600, subd. (b), as amended by Stats. 2000, ch. 643, § 1). S.B. 1128, which went into effect on September 20, 2006, amended the SVPA, inter alia, to add violations of Penal Code section 220 to the list of qualifying offenses under the SVPA. (See § 6600, subd. (b), as amended by Stats. 2006, ch. 337 (SB 1128), § 53, eff. Sept. 20, 2006.) Proposition 83 ("Jessica's Law"), which was passed by California voters on November 7, 2006, amended the SVPA so as to require that a person must have suffered a conviction for a sexually violent offense against one victim, not two as had been previously required under the SVPA; like SB 1128, it added violations of Penal Code section 220 to the list of qualifying offenses under the SVPA. (See § 6600, subds. (a)(1) & (b), as amended by Prop. 83, § 24, operative Nov. 8, 2006.)

It goes without saying that the amendments to the SVPA made by S.B. 1128 and Proposition 83 dramatically increased the number of prisoners eligible for commitment under the SVPA. It is highly likely that this increase in workload forced deputy commissioners working for CDCR and the Board to process the review and screening of potential SVPs quickly and without conducting detailed research on the legislative history and intent of section 6601.3.[16] Instead, these commissioners justifiably relied on the statute itself and the definition of good cause provided by regulation 2600.1(d). It was not their task to inquire whether the regulation was in conflict with the underlying purpose of section 6601.3 as reflected in the statute's legislative history. As pointed out by the *Sharkey* court, the

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[16] Had petitioner asserted this argument in his habeas petition in the appellate court, respondent would have been afforded an opportunity to present evidence to this effect.

Board had consistently maintained and utilized this regulation for over 14 years. (*Sharkey*, Slip Opn at 8.) What reason did the Board have to doubt the validity of the regulation after years of uninterrupted use? It also cannot seriously be doubted that there were persons in CDCR's custody who became eligible for commitment upon the passage of S.B. 1128 and/or Proposition 83 and who had EPRDs earlier than petitioner's which was on October 12, 2008. It would certainly have been reasonable for CDCR to prioritize its screenings and referrals for evaluation according to the inmates' respective EPRDs. In the face of a significantly increased number of persons eligible for SVP commitment upon passage of Jessica's Law, screening SVPs under the Act likely took on a heightened sense of urgency. Without a judicial determination invalidating regulation 2600.1(d) the deputy commissioners would have no reason to question the validity of the regulation they had relied on for years and the definition of good cause it provides. The increased workload and facial validity of the good cause definition found in regulation 2600.1(d) demonstrates that the commissioners relied in good faith upon subdivision (d) of the regulation, which supplied the definition of a showing of good cause for a 45-day hold under section 6601.3.

B. Any Mistake of Law by the Board Was in Good Faith

Finally, petitioner argues that the delay in completing the SVP evaluation process, not the action of the Board, was the primary cause of his unlawful custody. (OBM at pp. 28-33.) He contends that in order for section 6601(a)(2) to apply, an inmate's unlawful custody must be the result of a good faith mistake of law and not the result of something else. (*Id.* at p. 29.) Petitioner examines not only the Board's interpretation of the law when it issued the 45-day hold but also the events of the SVP screening process which preceded it in light of civil negligence principles, arguing,

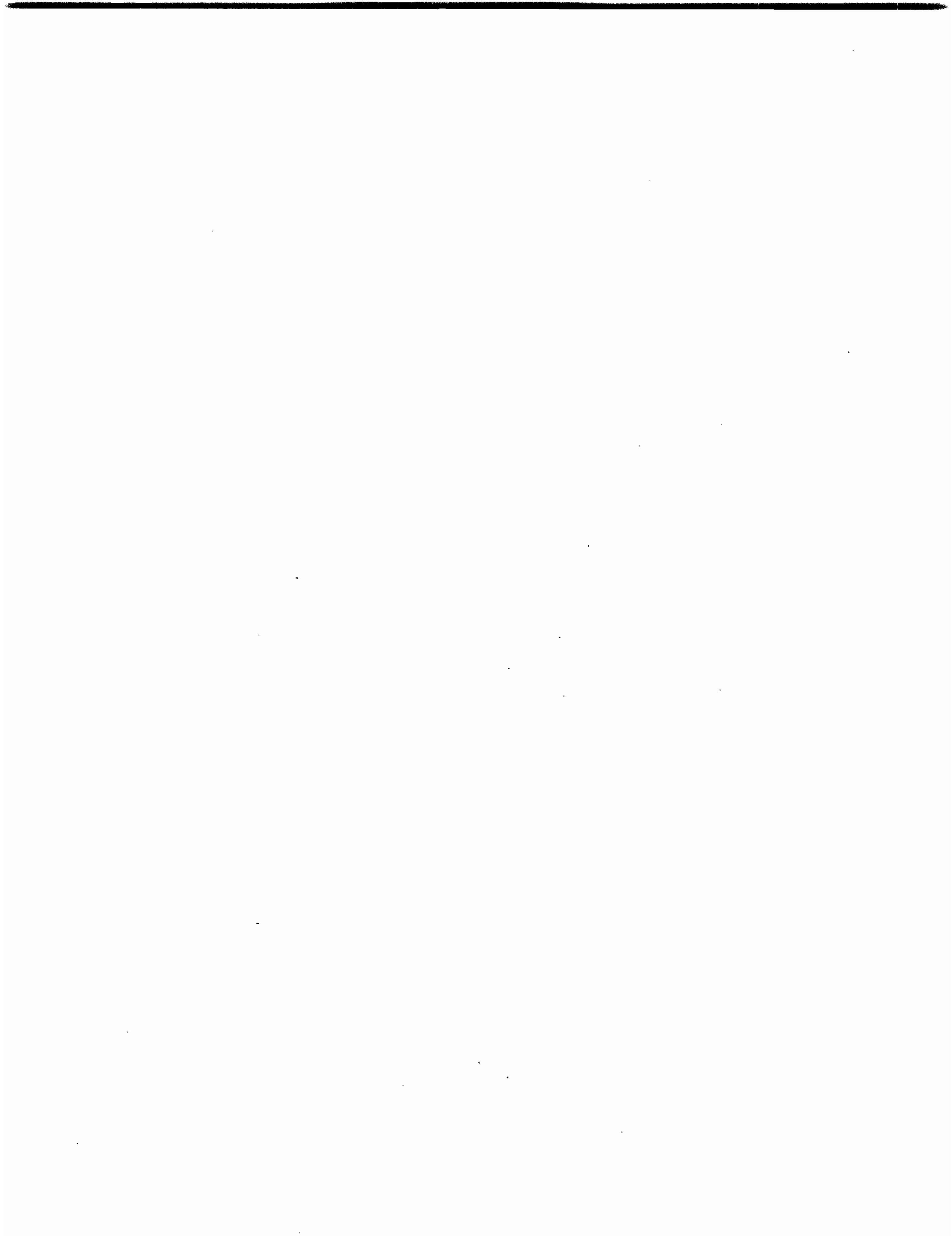
"Had there been no delay in the evaluation process, there would have been no 45-day hold and no unlawful custody." (*Id.* at p. 30.) But whether or not there was a justifiable delay in the evaluation process, the Board acted in good faith reliance on the regulation.

In order for section 6601(a)(2) to apply, the inmate must be in custody pursuant to a determinate prison term, parole revocation term, or hold placed pursuant to section 6601.3, at the time the commitment petition is filed. However, the petition may not be dismissed on the basis of 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. As set forth above, "A mistake of law is a mistake occurring when a person knows the facts as they are but has a mistaken belief as to the legal consequence of those facts." (*Powell v. City of Long Beach*, *supra*, 172 Cal.App.3d at p. 109.)

Here, there is no dispute as to the facts or that the Board was aware of the facts as they existed. On October 9, 2008, petitioner was in custody and was referred to DMH for a full evaluation under the SVPA. For a referral to DMH for a full evaluation under the SVPA, it necessarily must have been determined that petitioner was likely to be an SVP. (§ 6601, subd. (b).) The proper inquiry then is whether the Board incorrectly, but reasonably, believed that it could issue a 45-day hold based on the fact that there was some evidence petitioner was an SVP as provided by regulation 2600.1(d). If petitioner's custody is now determined to be unlawful because regulation 2600.1(d), upon which the Board relied, is not a valid regulation (if this Court finds that the definition of good cause provided in the regulation conflicts with section 6601.3), the Board's reliance on the regulation at the time the hold was issued was still reasonable. The Board appropriately utilized regulation 2600.1(d) to issue the 45-day hold on petitioner. The reasons for the screening delay by CDCR had no bearing on

the Board's determination of whether a 45-day hold should issue under the regulation as the regulation defined good cause. And the Board would have no way of knowing that the *Lucas* court would determine regulation 2600.1(d) to be invalid after the fact in the year 2010.

Hindsight is 20/20. In light of the fact that the regulation did not adequately define the phrase "good cause" as used in section 6601.3, and in light of the legislative intent of that phrase as used in the statute, perhaps the Board should have taken into account the reason for the delay by CDCR in completing the screening procedures since the reasons for the delay are relevant to the showing of good cause necessary to impose the hold in the first place. After lengthy legal analysis, it appears that good cause as required by section 6601.3 means the delay must be due to exigent circumstances, such as when an inmate's release date may be unexpectedly moved up, or where there is a shorter parole revocation term, and it is difficult or impossible to timely complete full evaluation of an inmate under section 6601, subdivisions (c) through (i), prior to the inmate's EPRD. But, at the time the 45-day hold was issued for petitioner, the Board relied on regulation 2600.1(d), which set forth the showing as being some evidence that petitioner was an SVP. The Board had such evidence and consequently issued the 45-day hold on petitioner. Under these facts, the Third District Court of Appeal's determination that petitioner's unlawful custody was the result of a good faith mistake of law was proper.



CONCLUSION

Accordingly, for the reasons stated, respondent respectfully asks that the decision of the Court of Appeal be affirmed.

Dated: November 15, 2010 Respectfully submitted,

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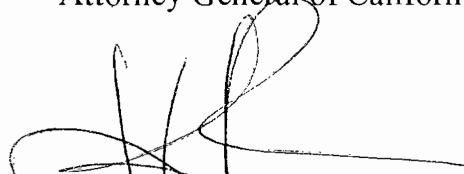
CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 14479 words.

Dated: November 15, 2010

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re David Lucas**
No.: **C062809**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 16, 2010, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 16, 2010, at Sacramento, California.

____
Declarant

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