IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent, CHRISTOPHER SHARKEY, Real Party in Interest.	S - 182355 B219011 (Los Angeles County Super. Ct. No. ZM014203)

REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS

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

Real party in interest, Christopher Sharkey, hereinafter "real party," and through his attorney Michael P. Judge, Public Defender of Los Angeles County, hereby files his Opening Brief on the Merits.

SUMMARY

Welfare and Institutions Code[1/] sections 6600 et seq., The Sexually Violent Predator Act, hereinafter "SVPA," effective January 1, 1996, provides for an indefinite commitment in a secure facility located on the grounds of an institution under the jurisdiction of the Department of Corrections upon a finding that a person is a "'sexually violent predator' [which] means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§§ 6600, subd. (a); 6604.) The SVPA, a involuntary civil commitment statute, is subject to the most rigorous form of constitutional review, and the act is the be narrowly construed. (Hubbart v. Superior Court (1999) 19 Cal.4th 1138, 1153, fn. 20; Peters v. Superior Court (2000) 79 Cal.App.4th 845, 848.)

Sections 6601 and 6601.3 set forth the pre-petition evaluation process and procedures in SVPA cases. The California Department of Corrections and Rehabilitation, hereinafter "CDCR," screens inmates in its custody who are "serving a determinate prison sentence or whose parole has been revoked" at least six months before their scheduled date of release from prison to determine whether they "may be a sexually violent predator." (§ 6601, subd. (a)(1).)[2/] The evaluation process is to commence at least six months prior to

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[1/] All Statutory references are to the Welfare and Institutions Code unless otherwise stated.

[2/] Section 6601, subdivision (a)(1), provides that: "Whenever the Secretary of the Department of Corrections and Rehabilitation determines that an individual who is in custody under the jurisdiction of the Department of Corrections and Rehabilitation, and who is either serving a determinate prison (continued...)

the scheduled parole date in order to allow the completion of the evaluation prior to that date, however, "upon a showing of good cause, the Board of Prison Terms [hereinafter "BPT"] may order that a person referred to the State Department or Mental Health [hereinafter "CDMH"] pursuant to subdivision (b) of Section 6601 remain in custody for no more than 45 days beyond the person's scheduled release date for full evaluation pursuant to subdivisions (c) to (i), inclusive, of Section 6601." (§ 6601.3.)[3/] "If as a result of this screening it is determined the person is likely to be a sexually violent predator," that person is referred to the CDMH for a full evaluation. (§ 6601, subd. (b).) The full evaluation by the CDMH is to be performed by two practicing psychiatrists or psychologists. (§ 6601, subd. (d).) If both evaluators concur that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director of the CDMH shall forward a request for a commitment petition to the county where the person was convicted of the

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[2/](...continued)
sentence or whose parole has been revoked, may be a sexually violent predator, the secretary shall, at least six months prior to that individual's scheduled date for release from prison, refer the person for evaluation in accordance with this section. However, if the inmate was received by the department with less than nine months of his or her sentence to serve, or if the inmate's release date is modified by judicial or administrative action, the secretary may refer the person for evaluation in accordance with this section at a date that is less than six months prior to the inmate's scheduled release date."

[3/] Section 6601.3, which is at issue in the above-entitled case, provides that: "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."

crime for which he is currently imprisoned. (§ 6601, subds. (d), (h)-(i).) If the county's designated legal counsel agrees with the request, he or she shall file a petition for commitment in superior court. (§ 6601, subd. (I).)

In the above-entitled case, the CDCR, Board of Parole Hearings, hereinafter "BPH,", BPT, and CDMH's implementation of sections 6601 and 6601.3 occurred as follows:

On February 19, 2008, while in state prison and approximately nine months prior to his parole date, real party was screened by a CDCR correctional counselor who determined that real party "'meets the criteria as a potential SVP pursuant to' section 6600 et seq." because he had been convicted on February 21, 1990, of a qualifying offense in case number A990223.[4/] (Slip Opn. at pp. 2-4; Petition for Writ of Mandate, hereinafter "Petition," Exh. 5, CDC 7377, at p. 84.) The correctional counselor's determination was documented in a Sexually Violent Predator Screening form, hereinafter "CDC 7377," after "a thorough review of all cental file documentation." (Pet., at p. 2.)

On March 12, 2008, CDCR referred real party's case to the BPH for further evaluation because real party meet the requirements for referral to the CDMH. (Slip Opn. at pp. 3-4.) "The referral packet included CDCR form 7377 with supporting documentation pertaining to the 1990 conviction, namely, a legal status summary, a staff recommendation summary which contained information obtained on Sharkey by the correctional counselor, the probation officer's report, the abstract of judgment, chronological history of records by staff, the complaint and information in the criminal case, and a

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[4/] The alleged 1990 conviction presents potentially two qualifying offenses under the SVPA–i.e., a violations of Penal Code sections 261, subdivision (2), and 262. (Pet., at pp. 1-2.)

criminal history on Sharkey." (Slip Opn. at p. 4.) The CDC 7377 also documented the fact that real party's parole release date was November 24, 2008. (Pet., Exh. 5, CDC 7377, at p. 84; Pet., Corrected Reporter's Transcript of June 13, 2009, hereinafter "CRT," at p. 9.)

Supervising parole agent Sara Lopez, assigned to the Sexually Violent Predator for Mental Health Disorders Offenders Unit at the BPH, testified that the CDCR's referral process is complete when it determines the individual has a potential qualifying conviction and sends the CDC 7377 and supporting documents to the BPH. (CRT, at p. 14-15.) Supervising parole agent Lopez further testified that the BPH can make a referral to the CDMH with just the abstract of judgment for the alleged qualifying offense and the BPH could have made the referral immediately to the CDMH (Id., at pp. 18-19).

Notwithstanding the foregoing facts and testimony, on March 17, 2008, supervising parole agent Lopez assigned real party's case to retired parole agent Richard Perry whose only role was to confirm the qualifying conviction set forth in the CDC 7377, instead of referring the case directly to the CDMH. (Slip Opn. at p. 4; CRT, at p. 18.) Parole agent Perry was laid off in July, 2008. (Ibid.) Supervising parole agent Sara Lopez, testified that parole agent Perry submitted no reports on real party's case–i.e., produced no work product--and that on August 13, 2008, after three attempts to rehire parole agent Perry she reassigned real party's case to parole agent Andrea Zahner. (CRT, at pp. 20, 24-25.) Real party's case was finally referred to the CDMH on September 11, 2008. (Slip Opn. at p. 4; Pet., Exh. 3, at pp. 21-22.)

On September 11, 2008, the BPH referred real party's case to the CDMH. (Slip Opn. at p. 4.) On September 19, 2008, Garret Essres, Ph.D., a licensed psychologist on the CDMH panel, performed a Level II screening to determine "'whether or not there is any chance of a diagnosis in the presented

case. If there is no chance of diagnosis or the risk is too low the case is not sent on for further evaluation.'" (Id., at p.5; Pet., Exh. 7, at p. 111.) Dr. Essres referred real party for further evaluation by the CDMH "because of the 'high actuarial risk, possible applicable diagnosis, predatory, untested in the community and high chronicity.'" (Slip Opn. at p. 5; Pet., Exh. 7, at p. 111; Pet., Exh. 5, at pp. 80-82.)

CDMH evaluator, Dr. Karlsson, interviewed real party on October 2, 2008, submitted his Clinical Evaluation Summary on October 10, 2008, and submitted his final report on October 29, 2008. (Slip Opn. at p. 5; Pet., Exh. 1, at p. 5; Pet., Exh. 4, at p. 66, 68; CRT, at p. 4.) CDMH evaluator, Dr. Koetting, interviewed real party on October 14, 2008, and submitted his Clinical Evaluation Summary on November 17, 2008, in which he opined that real party met the criteria for prosecution under the SVPA. (Ibid.)

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

On November 20, 2008, Deputy Commissioner Marita Williams, granted the 45-day hold pursuant to section 6601.3 "'to facilitate full SVP evaluations to be concluded by the" CDMH effective from November 24, 2008, to January 8, 2009. (Slip Opn. at p. 5; Pet., Exh. 4, p. 60; Pet., Exh. 5, at p. 83.) Ms. Mard's file note reflected that Dr. Koetting needed more time to complete his report as the case was complex but she cannot recall if she

actually offered those facts to Deputy Commissioner Williams as the basis for the extension. (Pet., Exh. 1, at p. 6.) Deputy Commissioner Williams stated in her declaration that it is her custom and practice to review a CDMH Level II screening document to insure the inmate meets the initial screening criteria for SVP screening but she was unable to produce real party's Level II screening. (Pet., Exh. 5, at p. 83.)

On December 2, 2008, Dr. Koetting completed his final report. (Slip Opn. at p. 5.)

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

In summary, CDCR timely began its section 6601 evaluation approximately nine months before real party's November 24, 2008, parole date and completed it in approximately three days, well within section 6601's six month requirement. Then the BPH failed to timely conduct and complete its evaluation which merely entailed verification of information supplied by CDCR which was sufficient, in and of itself, to commence the CDMH evaluation process without further investigation or delay according to the testimony of supervising parole agent Lopez. (CRT, at pp. 18-19.) Instead, the evaluation process was negligently allowed to languish from March 17, 2008, when parole agent Perry was assigned until it was reassigned to parole agent Zahner on August 13, 2008–i.e., a period of almost five months. Notably, after the case was reassigned to parole agent Zahner, she was able to complete the evaluation in approximately 29 days. A second negligent, unwarranted, and unnecessary delay occurred when the CDMH allowed one of its evaluators, Dr. Koetting, to delay the completion his final report

notwithstanding the fact that Dr. Koetting had submitted his Clinical Evaluation Summary seven days before real party's parole date in which he concluded real party met the SVPA criteria and the other evaluator, Dr. Karlsson, timely completed his final report approximately three weeks prior to real party's parole date. In light of these facts, it is self-evident that the granting of the 45-day extension for Dr. Koetting to submit his final report on the purported ground that case was "complex" was nothing more than a scam. Indeed, there is no evidence that even the mere conclusion more time was needed because of the complexity of the case was even communicated to Deputy Commissioner Williams. (Pet., Exh. 1, at p. 6.) Had either the BPH and/or the CDMH timely and competently performed their statutorily mandated duties, consideration of the 45-day hold would not have been necessary.

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 these cases?

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STATEMENT OF THE CASE AND FACTS

A. Proceedings in the Trial Court.

On December 23, 2008, Steve Cooley, the District Attorney of Los Angeles County, hereinafter "petitioner," filed a petition alleging that real party came within the purview of the SVPA because he was allegedly convicted of three sexually violent offenses. (Slip opn. at pp. 3, 6.) The alleged sexually violent offenses were for a 1979 conviction for rape by force (Pen. Code § 261) and 1990 convictions for rape by force and assault with intent to commit rape (Pen. Code § 220). (Slip Opn. at p. 3.)

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

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

"Thereafter, the parties filed supplemental papers with respect to the validity of the pertinent regulation, California Code of Regulations, title 15, section 2600.1, which defines 'good cause' for purposes of imposing a 45-day

hold pursuant to section 6601.3." (Slip Opn. at p. 7.) Real party "contended the regulation does not meet due process standards because it lacks any provision to determine whether the delay was justified and whether the CDMH and the Board exercised due diligence. Further, even assuming the regulation is valid, no good cause was shown when the Board extended his scheduled release date by 45 days to allow more time to determine whether Sharkey met the criteria for civil commitment as an SVP." (Ibid.) Petitioner contended "the 45-day extension was proper because there was some evidence that Sharkey committed a sexually violent offense and some evidence he was likely to engage in sexually violent predatory criminal behavior." (Ibid.)

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

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

> "However, the court finds that the good cause definition set out in section [2600.1] of the CCR is clearly erroneous. It is not a definition of good cause-a reason why more time is needed. It simply declares that if the state of the underlying evidence is satisfactory under the 'some evidence' standard, the deadline is not enforced.' Merely 'because 'some evidence' exists that an inmate meets the criteria as a SVP cannot establish good cause to meet the filing deadline.'" (Slip Opn. at p. 8.)

B. Proceedings in the Court of Appeal.

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

On March 25, 2010, in a published decision the Court of Appeal reversed the trial court's ruling holding Regulation 2600.1, subdivision (d)'s, definition of "good cause is "proper" and its "standard for good cause was met in this case–there was some evidence before the Board that Sharkey had committed a qualifying offense and some evidence that he is likely to engage in sexually violent predatory criminal behavior." (Slip Opn. at pp. 2-3.) Alternatively, the Court of Appeal ruled that section 6601, subdivision (a)(2)'s, provision that "[a] petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law" would have permitted the petitioner and the Board to rely on the regulation so as to preclude a dismissal of the petition. (Id., at pp. 16-17.)

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MEMORANDUM OF POINTS AND AUTHORITIES

I

STANDARD OF REVIEW

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

The trial court conducted an evidentiary hearing on June 15, 2009, wherein it received into evidence numerous exhibits, including three declarations and testimony from supervising parole agent Sara Lopez via video conference.[5/] (Pet., Exh. 1, at p. 1.) Based on the foregoing exhibits, declarations, and testimony the trial court arrived at a detailed factual history of the facts surrounding the CDCR, BPH, and CDMH'S evaluation in real party's case pursuant to sections 6601 and 6601.3. (Pet., Exh. 1, at pp. 3-5.) It is upon this foundation that the trial court made the following specific factual findings which are supported by substantial evidence:

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

1) "Interestingly, there is no document setting forth the factual basis for the 'good cause' found to justify the 45-day hold placed on Mr. Sharkey. Nor did any witness testify as to what the good cause was. Exhibit B, the form signed by Deputy Commissioner Williams, simply states that there is good cause to extend the date to facilitate full SVP evaluations by CDMH. Her declaration does not address the issue." (Pet., Exh. 1, at p. 5.)

2) "Nor does Elizabeth Mard, the caseworker who requested the extension, explain in her declaration why the extension was needed. The closest she comes to proffering any supporting facts is her contemporaneous file note that Dr. Koetting needed more time to complete his written report as the case was complex. But she cannot recall if she actually offered those facts to Commissioner Williams as the basis for the extension." (Pet., Exh. 1, at p. 6.)

3) "No witness testified as to the facts presented to the Board of Parole Hearings. Deputy Commissioner Williams extended the deadline to 'facilitate full evaluation.'" (Pet., Exh. 1, at p. 6.)

4) "Elizabeth Mard's case note indicating that Dr. Koetting needed more time because the case was complex might have been a good reason to grant the extension, but no one could testify that 'complexity' was actually presented to Deputy Commissioner Williams. Nor, assuming that 'complexity' was actually presented, did Deputy Commissioner Williams testify that she actually relied upon that reason in granting the extension. The court would think that, given the enormity of the consequences of the extension for Mr. Sharkey - 45 additional, otherwise unwarranted days in custody - that someone would have carefully documented the facts justifying that extension. No one did." (Pet., Exh. 1, at p. 6.)

5) "There was 'some evidence' that Mr. Sharkey met both parts of the criteria listed in section 2600 - a qualifying offense and a likely of engaging in sexually violent predatory behavior, the latter satisfied by Dr. Karlsson's October 10, 2008 Clinical Evaluation Summary and his October 29, 2008 written report." (Pet., Exh. 1, at pp. 6-7.)

6) "Everyone knew what the operative dates were and the underlying facts that needed to be established to determine if Mr. Sharkey qualified under the statute." (Pet., Exh. 1, at p. 7.)

7) "There is no evidence upon which the court can infer the reasons behind Ms Williams's decision." (Pet., Exh. 1, at p. 7.)

Based on the foregoing factual findings, the trial court's ruling that "good cause" justifying the 45-day hold pursuant to section 6601.3 was not present is supported by substantial evidence. In arriving at this ruling, the trial court correctly determined that Regulation 2600.1, subdivision (d), purportedly defining "good cause" pursuant to section 6601.3 was woefully deficient on its face and that the definition of "good cause" set forth by California's decisional law was the proper and applicable legal standard.

II

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

Section 6601.3 permits an individual to be held for up to 45 days beyond his or her scheduled release date for a full evaluation upon a showing of "good cause." The burden is on the petitioner to demonstrate the presence of "good cause." (Evid. Code § 500, "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.") After applying the correct legal standard for "good cause," the trial court properly

ruled that there was inadequate showing of "good cause" to justify the 45-day hold in the above-entitled case. (Pet., Exh. 1.)

Section 6601.3 fails to define it usage of the term "good cause." (Slip Opn. at p. 12.) Because section 6601.3's usage of the term "good cause" is undefined, it is ambiguous and thus resort to the rules of statutory construction are necessary.[6/] "The goal of statutory construction is to ascertain and effectuate the intent of the Legislature. Ordinarily, the words of the statute provide the most reliable indication of legislative intent. When the statutory language is ambiguous, the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. 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." (People v. Jefferson (1999) 21 Cal.4th 86, 94, citations and internal quotations omitted.)

The court of appeal in the above-entitled case failed to correctly interpret section 6601.3's "good cause" requirement by its holding that Regulation 2600.1, subdivision (d)'s, definition of "good cause is "proper" and its "standard for good cause was met in this case–there was some evidence before the Board that Sharkey had committed a qualifying offense and some evidence that he is likely to engage in sexually violent predatory criminal

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[6/] Also see section III B., post for additional discussion regarding rules of statutory construction vis-a-vis section 6601.3 and Regulation 2600.1's use of the term "good cause."

behavior." (Slip Opn. at pp. 2-3.)[7/] Compare the court of appeal decision in Lucas which held the legislative intent surrounding the enactment section 6601.3 was not to grant 45-day holds in cases where an inmate meet several of the SVPA criteria, rather it was enacted to cover situations where "exceptional circumstances might make it impossible to complete a sexually violent predator evaluation before the inmate's scheduled release date, despite the best efforts of corrections, mental health, and the board to complete the evaluation within that time." (In re Lucas (2010) 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 881, Rev. Gtd. June 17, 2010, Case No. S181788.)[8/]

The legislative history surrounding the enactment of section 6601.3 clearly demonstrates legislative intent that 45-day holds only be granted in very limited circumstances. The express legislative purpose for the enactment of section 6601.3's 45-day hold is "'to cover situations in which an inmate's release date may be unexpectedly moved up, or when a parole revocation term allows insufficient time to complete the evaluation process.' (Assem. Com. on Appropriations, Analysis of Sen. Bill No. 451 (1999-2000 Reg. Sess.) Apr.

[7/] The court of appeal in the above-entitled case failed to directly interpret section 6601.3. Instead, the court of appeal relied on the BPH's interpretation section 6601.3 published in Regulation 2600.1, subdivision (d). (Slip. Opn. at pp. 12-16.)

[8/] Counsel for real party acknowledges the prohibition against the citation of depublished cases as authority. All reference herein to the Lucas decision is not for the purpose of citation as authority. Rather, it is because Lucas is a sister case to the Sharkey–i.e., review was granted by this Court as to both cases on June 17, 2010, and this Court stated that "Lucas and Sharkey present the following issues: . . ." which are identical. Because this Court is currently considering the Sharkey and Lucas cases simultaneously, it appears necessary to discuss the explicit language utilized by the court of appeal in Lucas in order to fully address the issues presented by Sharkey.

12, 2000, pp. 1-2, underlining omitted.)" (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 881-882.)

The SVPA went into effect on January 1, 1996. Section 6601.3 was added to the law as a "clean-up" provision on January 25, 1996. (A.B. 1496, Stats. 1996, chap. 4, § 2.)

The SVPA itself was unclear whether an inmate could be held beyond his or her release date in cases where the SVP evaluation process had not yet been completed. In its original form, section 6601.3 provided:

> "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) through (i), inclusive, of Section 6601, unless his or her scheduled release date falls more than 45 days after referral."

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

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

be made." (Mot. For Jud. Notice[9/], Exh. A, Enrolled Bill Report, Department of Corrections, Jan. 25, 1996, p. 2.)

Section 6601.3 was re-enacted in 1998 after a sunset provision in the original measure took effect January 1, 1998. (S.B. 536, Stats. 1998, chap.19, § 1, eff. Apr. 14, 1998.)

The Assembly Committee on Public Safety analysis of July 8, 1997, stated that S.B. 536:

> "Continues in effect provisions added by AB 1496 (Sher), Chapter 4, Statutes of 1966 [sic], to permit the Board of Prison Terms (BPT) to order a person who has been referred to the DMH for evaluation to remain in custody for no more than 45 days for evaluation in those circumstances when the restoration of time credits to the person's term of imprisonment renders the normal time frames for SVP commitment impracticable." (Mot. For Jud. Notice, Exh. B, Assembly Committee on Public Safety Analysis, July 8, 1997, pp. 1, 3.)

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

> "This bill would eliminate the sunset. Most referrals for [SVP] evaluation will be made months prior to release on parole, however, there will be instances where release dates are modified by judicial or administrative actions. If the individual is suspected of being an SVP, continuation of this language [regarding 45-day holds] allows for the individual to be held, if necessary, beyond their release date for the completion of the

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[9/] Counsel for real party contemporaneously filed with the above-entitled Opening Brief on the Merits, a Motion For Judicial Notice In Support Of Real Party In Interest's Opening Brief On The Merits which requests this Court to take Judicial Notice pursuant to Evidence Code section 459 and California Rules of Court, Rule 8.524, subdivision (g), of section 6601.3's legislative history comprising of Exhibits A through G.

evaluation." (Mot. For Jud. Notice, Exh. C, Department of Finance Bill Analysis, Aug. 20, 1997, p. 2.)

According to an analysis of S.B. 536 prepared for the August 27, 1997, hearing of the Assembly Appropriations Committee, the measure would permit the imposition of 45-day holds "when restoration of sentence credits renders the normal time frames [for] SVP commitment unworkable." (Mot. For Jud. Notice, Exh. D, Assembly Committee on Appropriations Analysis, Aug. 17, 1997, p. 1.)

In a report to Gov. Davis recommending that he sign S.B. 536, CDCR gave the following justification:

> "It is important to identify these persons [potential SVP's] early in their incarceration in order for the DMH evaluation to be completed by the time the person would otherwise parole from prison, at which time they can be turned over to county jurisdiction for civil commitment trial. Many persons, especially parole violators, serve a very short time in prison (often 6 months or less). It is difficult to complete the identification process and DMH evaluation by the time they would be released to serve parole.
>
> "S.B. 536 would reestablish W&I Code Section 6601.3 allowing BPT to place a hold ... on these persons for up to 45 days for DMH to complete their evaluation." (Mot. For Jud. Notice, Exh. E, Enrolled Bill Report, Department of Corrections, dated Apr. 8, 1998, p. 1.)

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

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

> "The bill also clarifies 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." (Mot. For Jud. Notice, Exh. F, Assembly Committee on Appropriations Analysis, Apr. 12, 2000, p. 1, emphasis in the original.)

In a report to Gov. Davis, recommending that he sign S.B. 451, the CDCR, which had sponsored the measure, repeated verbatim the foregoing April 12, 2000, Assembly Committee on Appropriations Analysis statement of intent. (Mot. For Jud. Notice, Exh. G, Enrolled Bill Report, Department of Corrections, June 12, 14, 2000, p. 2.)

The factual scenarios underlying section 6601.3's express legislative purpose are absent in the above-entitled case–i.e., a parole date not unexpectedly moved up nor was real party in custody based on a parole revocation which allowed insufficient time to complete the evaluation process. Significantly, the evaluation in the above-entitled case was commenced approximately nine months prior the real party's parole date which allowed adequate time for a full evaluation. Therefore, the 45-day hold imposed in the above-entitled case was unlawful because it did not fall within the ambit of section 6601.3's definition of "good cause."

III

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

A. Misconstruction Of Regulation 2600.1 By The Court Of Appeal

Both the Sharkey and Lucas courts misconstrued the requirements of Regulation 2600.1 because their analysis was confined to subdivision (d) without consideration of the regulation as a whole. Specifically, Regulation 2600.1, subdivisions (a) and (b) were not considered or analyzed.

The court of appeal in the above-entitled case held Regulation 2600.1, subdivision (d)'s, definition of "good cause is "proper" and its "standard for good cause was met in this case–there was some evidence before the Board that Sharkey had committed a qualifying offense and some evidence that he is likely to engage in sexually violent predatory criminal behavior." (Slip Opn. at pp. 2-3.) In direct contrast to the court of appeal's holding in the instant case, the Court of Appeal, Third District, held in In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr. 871) "the definition of good cause contained in subdivision (d) of section 2600.1 of title 15 of the California Code of Regulations (regulation 2600.1(d)) is inconsistent with the legislative intent behind the statutory good cause requirement. Thus, to the extent the board relied on the regulation in extending Lucas's incarceration, Lucas's custody was unlawful." (Id., at 105 Cal.Rptr.3d 873-874.)

Section 6601.3 fails to define it usage of the term "good cause." (Slip Opn. at p. 12.) "'What is 'good cause,' may be difficult to define with precision, since it must, in a great measure, be determined by reference to the particular circumstances appearing in each case.'" (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 878.) The court of appeal's definition of "good cause" in the above-entitled case–i.e., that there is some evidence before the Board that an inmate has committed a qualifying offense and some evidence that he is likely to engage in sexually violent predatory criminal behavior– is legally incorrect based on two reasons:

First, the Sharkey court erroneously construed Regulation 2600.1, subdivision (d), in a vacuum because it failed to take account of the language and requirements of the regulation on a whole. Specifically, Regulation 2600.1, subdivisions (a) and (b), requires the establishment of a 3-day hold predicated on "exceptional circumstances" prior to the establishment of a 45-day hold. Although the Lucas court reached the correct conclusion that Regulation 2600.1, subdivision (d), as applied was invalid, it also failed to correctly analyze the overall language of the regulation.[10/]

Second, the Sharkey court failed to correctly interpret section 6601.3 and its implementation by Regulation 2600.1. (See Argument II, ante.)

Regulation 2600.1 in relevant part provides:

> "(a) Upon notification from the Division of Adult Institutions, Department of Mental Health, or Board of Parole Hearings (board) staff that either an inmate or parolee in revoked status may or does require a full evaluation pursuant to subdivisions (c) through (i) inclusive of Welfare and Institutions Code section 6601 to determine whether that person may be subject to commitment as a sexually violent predator, the board may order imposition of a temporary hold on the person for up to three (3) working days beyond their scheduled release date pending a good cause determination by the board pursuant to section 6601.3 of the Welfare and Institutions Code where exceptional circumstances preclude an earlier evaluation by the person pursuant to section 6601 of the Welfare and Institutions Code.
>
> "(b) Staff shall document that either inmates or parolees in revoked status subject to the temporary hold in subdivision (a) of this section either have been screened or are in the process of being screened as a person likely to be a sexually violent predator pursuant to Welfare and Institutions Code section

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[10/] Any theory which would support the lower court's ruling can be urged to affirm that court's ruling on appeal. (People v. Braeseke (1979) 25 Cal.3d 691, 701.)

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.[11/] The preceding felony violations must be against one or more victims.[12/]

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

[12/] Cf. Section 6600, subdivision (a), in relevant part requires "a sexually violent offense 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."[13/] (Emphasis and Footnotes Added.)

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

Before a 45-day hold may be imposed pursuant to Regulation 2600.1, subdivision (d), the Board must first comply with subdivision (a)'s 3-day hold requirement. By its express terms, Regulation 2600.1, subdivision (a), requires

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

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

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

exceptional showing of good cause" vis-a-vis applications for extensions of time wherein eleven specific considerations are set forth.)

Arguendo, even if the definition of "good cause" embodied in Regulation 2600.1, subdivision (d), merely requires a finding that "there was some evidence before the Board that Sharkey had committed a qualifying offense and some evidence that he is likely to engage in sexually violent predatory criminal behavior" (Slip Opn. at pp. 2-3), such finding must have been preceded by a finding of "exceptional circumstances" as required by subdivision (a), which was totally devoid in the above-entitled case. (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 873-874 "the definition of good cause contained in subdivision (d). . . is inconsistent with the legislative intent behind the statutory [section 6601.3] good cause requirement.")

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

B. Reliance On Regulation 2600.1, Subdivision (d)'s, Definition Of "Good Cause" Is Unwarranted

Regulation 2600.1, subdivision (d), purports to define section 6601.3's "good cause" standard by utilizing section 6600's, statutory language, almost verbatim.[14/] (See text of Regulation 2600.1, subd. (d) and section 6600, subdivision (4)(b), ante.) "[R]ules and regulations. . . must be reasonable, since parolees retain constitutional protection against arbitrary and oppressive official action." (Terhune v. Superior Court (1998) 65 Cal.App.4th 864, 874.)

[14/] Cf. "Regulation 2600.1(d) lacks the element of a diagnosed mental disorder that is part of section 6600." (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 878 n. 3.)

As the facts readily demonstrate, there were no "exceptional circumstances [which] prelude[d] an earlier evaluation" in the above-entitled case. Negligent conduct by the BPH and the CDMH caused the delay.

As a general rule, regulations are only entitled to great weight when they are not clearly erroneous or unauthorized. (Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 12.) However, the meaning of Section 6601.3's requirement that a 45-day hold only be granted "[u]pon a showing of good cause" is a function of the courts to interpret. (Id., at p. 11, fn. 4, "A court does not, in other words, defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature. The court, not the agency, has 'final responsibility for the interpretation of the law' under which the regulation was issued.") The role of the court versus the role of an administrative agency in interpreting statutory language as defined by the Yamaha decision was recently elaborated on by court in California Veterinary Medical Association:

> "[T]he Supreme Court distinguished the level of judicial deference to be accorded an agency's quasi-legislative acts, in which the agency exercises its delegated lawmaking power, from interpretive acts, in which the agency gives its view of the meaning or legal effect of a statute or regulation, 'questions lying within the constitutional domain of the courts.' Although courts are bound by an agency's rulemaking as long as it is authorized by the enabling legislation, 'the binding power of an agency's interpretation of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation.' Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. [Citation.] Considered alone and apart from the context and circumstances that produce them, agency

> interpretations are not binding or necessarily even authoritative." (California Veterinary Medical Ass'n v. City of West Hollywood (2007) 152 Cal.App.4th 536, 555-556, citations omitted; also see Traverso v. People ex rel. Dept. of Transportation (1996) 46 Cal.App.4th 1197, 1206-1207, "furthermore, where an agency's interpretation alters or enlarges the terms of a statute, the interpretation 'does not govern the interpretation of [the] statute, even though the statute is subsequently reenacted without change;'" Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (1999) 71 Cal.App.4th 1518, 1520, "as a general principle, the Department may not adopt a rule which would conflict with the enabling or otherwise governing statute;" and, Association for Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 391, "But regardless of the force of administrative construction, final responsibility for interpretation of the law rests with courts. If the court determines that a challenged administrative action was not authorized by or is inconsistent with acts of the Legislature, that action is void.")

Regulation 2600.1, subdivision (d)'s, definition of "good cause" when viewed in isolation–i.e., without reference to subdivision (a) and (b)--is vague, inconsistent with section 6601.3's intent, and is of "little worth." (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 881, "'[n]o matter how altruistic its motives, an administrative agency has no discretion to promulgate a regulation that is inconsistent with the governing statutes.'") Subdivision (d) merely recites, substantially verbatim, section 6600's statutory language without any attempt to set forth guidelines for the application of this language. In the words of trial court, "the court finds that the good cause definition set out in section 2600 of the CCR is clearly erroneous. It is not a definition of good cause-a reason why more time is needed." (Pet., Exh. 1, p. 7.) "Case law defines good cause as 'a good reason for a party's failure to perform that specific requirement [of the statute] from which he seeks to be excused.'"

(Katz v. Campbell Union High School District (2006) 144 Ca1.App.4th 1024; Munroe v. L.A. County Civil Service Commission (2009) 173 Cal.App.4th 1294.) Good cause must take account "'as minimum requirements, real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results adequate excuse that will bear the test of reason, just grounds for action, and always the element of good faith.'" (California Portland Cement Co. v. Cal. Unemployment Insurance App. Board (1960) 178 Cal.App.2d 263, 272-73; Amaro v. UIAB (1977) 65 Cal.App.3d 715, 719 n.1.) "[G]ood cause does not exist unless there is something exceptional about the case-something that made it difficult or impossible to complete the evaluation within the normal time frame." (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 881.)

The court of appeal in the above-entitled case erroneously ruled that Regulation 2600.1, subdivision (d), is valid. (Slip Opn. at p. 16.) The court of appeal also erroneously ruled that "the regulations criteria for imposition of a 45-day hold were clearly satisfied," the criteria being that "there was some evidence before the Board of a qualifying offense and some evidence that Sharkey was likely to engage in sexually violent predatory behavior." (Ibid.) In reaching the opposite result, the Lucas court held "[b]ecause regulation 2600.1(d) purports to allow a finding of good cause for a 45-day hold based solely on evidence that the inmate may be a sexually violent predator, and does not require a showing of exceptional circumstances that precluded the completion of the sexually violent predator evaluation within the normal time frame, the regulation is invalid, as it is inconsistent with the legislative intent behind section 6601.3." (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 881.) The Lucas court continued "[b]ecause the definition of good cause in regulation 2600.1(d) is inconsistent with the legislative intent

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

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

The trial court's observation of identical terminology–i.e., "good cause"–utilized by the Penal Code is not without precedence. The SVPA accords individuals subject to commitment most of the rights commensurate with criminal proceedings. For example, section 6603 provides for the right to counsel, the right to expert assistance, the right to discovery, trial by jury, and the right to a unanimous verdict, and section 6604 provides that the prosecution's burden of proof is beyond a reasonable doubt. Section 6602 provides for probable cause hearings in SVPA cases. Section 6602, subdivision (a), requires a finding of "probable cause" but fails to specifically define the meaning of "probable cause." (Cooley v. Superior Court (Marentez) (2003) 29 Cal.4th 228, 251.) In defining the legislative use of the term "probable cause" under the SVPA, this Court looked to the usage of the term

in the criminal law, which it ultimately adopted. (Id., at p. 247, "For this reason, based on the structure of the SVPA, a section 6602 hearing is analogous to a preliminary hearing in a criminal case. . . .", also see, p. 251, "We assume, therefore, that the Legislature, by using the term 'probable cause' in section 6602, subdivision (a), intended an analogous definition and application of this term in the context of this civil commitment scheme.")

The trial court's seeking guidance from the judicial construction of the term "good cause" is sound. (City of Long Beach v. Marshall (1938) 11 Cal.2d 609, 620, "[a]nd the rule of law is well established that where the legislature uses terms already judicially construed, 'the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts.'") In a recent SVP decision relating to the issuance of subpoena duces tecum, the court considered the statutory requirement for a showing of "good cause." A showing of "good cause" must set forth the materiality of the issue involved in the case which is not met by a statement totally devoid of any statement of facts. (Lee v. Superior Court (2009) 177 Cal.App.4th 1108, 1127-1128.) Allegations which constitute "a conclusion of law" does not satisfy the requirement of "good cause." (Ibid.) Regulation 2600.1, subdivision (d)'s purported definition of "good cause" does not set forth any facts supporting the need for a 45-day hold and is a "conclusion of law" which merely restates, almost verbatim, selected portions of section 6600.

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

IV

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

Both the Sharkey and Lucas courts erroneously ruled that section 6601, subdivision (a)(2), precludes dismissal notwithstanding a finding that Regulation 2600.1 is invalid. (Slip Opn. at p. 17, "[a]lthough the trial court believed the subject regulation is invalid, the trial court should have recognized that absent a judicial determination of invalidity, the Board and the People were entitled to rely on the regulation, so as to preclude a dismissal of the petition. (§ 6601, subd. (a)(2).)"; In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 882-883, "[i]n determining whether Lucas's unlawful custody resulted from a good faith mistake of law, two questions are pertinent: first, did the board rely on regulation 2600.1(d) in placing the 45-day hold on Lucas, and second, could the board reasonably have relied on the regulation in placing the hold. If the answer to both questions is 'yes,' then Lucas's unlawful custody was the result of a good faith mistake of law.")

Section 6601, subdivision (a)(2), provides that "[a] petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law. This paragraph shall apply to any petition filed on or after January 1, 1996." The burden of showing "a good faith mistake of fact or law" as required by section 6601, subdivision (a)(2), is on the Petitioner. (People v. Superior Court (Small) (2008) 159 Cal.App.4th 301, 304, "the People failed to show that its delay in filing the petition resulted from a good faith mistake of fact or law (§ 6601, subd. (a)(2).")

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

Second and alternatively, there was no reasonable grounds for the deputy commissioner's reliance on Regulation 2600.1, subdivision (d), because its definition of "good cause" was so "facially deficient" that no commissioner could not reasonably presume it to be valid. (Cf. United States v. Leon (1984) 468 U.S. 897 [104 S.Ct. 3405, 82 L.Ed.2d 677]; People v. Willis (2002) 28 Cal.4th 22, "evidence obtained pursuant to a search warrant

that is not supported by probable cause must be suppressed 'where an officer's reliance on a search warrant was not 'objectively reasonable,' i.e., the officer had 'no reasonable grounds for believing that the warrant was properly issued.' [Citation.].") Significantly, the appointment, qualifications, and training of Board of Parole Hearing commissioners and deputy commissioners are regulated by statute. (Pen. Code §§ 5075 et seq.; Govt. Code § 12838.4) Commissioners and deputy commissioners must be held to a minimum, if not a higher, standard. These judicial or quasi-judicial officers should reasonably have been able to interpret and apply Regulation 2600.1 accurately and should have known that reliance on subdivision (d) alone created a "facially deficient" and invalid standard of "good cause" notwithstanding the fact that there had been no prior judicial or administrative decision addressing the validity of Regulation 2600.1. This is preciously what the trial court in the above-entitled case found: "the court finds that because the regulation eviscerates the common legal definition of good cause, it could not be reasonably relied upon under these circumstances." (Pet., Exh. I, p. 7.)

Significantly, the CDCR itself explicitly acknowledged the fact that the purpose of 45-day holds are limited–i.e., they were necessary during the initial year of the SVP law's operation and for "inmates whose release dates are advanced through judicial or administrative action so as to collapse the 6 month lead time, either before the process of referral has begun or before a probable cause determination can be made." (Mot. For Jud. Notice, Exh. A, Enrolled Bill Report, Department of Corrections, Jan. 25, 1996, p. 2; also see Mot. For Jud. Notice, Exh. E, Enrolled Bill Report, Department of Corrections, dated Apr. 8, 1998, p. 1, and Mot. For Jud. Notice, Exh. G, Enrolled Bill Report, Department of Corrections, June 12, 14, 2000, p. 2.)

Third and alternatively, the Lucas' court analysis that "[t]he determination of whether Lucas's unlawful custody resulted from a good faith mistake of law does not depend on whether corrections was negligent in waiting until only 11 days before his parole release date to follow up on the initial screening form completed almost 10 months earlier. Whether corrections was negligent in that regard is pertinent only to whether there was good cause for placing the 45-day hold, as we have interpreted that term. We have concluded already that no good cause was shown." is erroneous. (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 882.)

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

Negligence cannot be properly categorized as a good faith mistake of law. The five month delay by the BPH and subsequently delay by the CDMH in the above-entitled case were not due to any mistake of law. Quite simply, the agencies negligently failed to perform their statutorily mandated duties thus depriving real party of his liberty. (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 879, "when a parole release date has been set, the inmate has a legitimate liberty interest in actually being released from prison on that date.") Neither did such negligence constitute a mistake of fact. (Slip Opn. at p. 17; Pet., Exh. 1, at p.7, "[h]ere there was no good faith mistake of fact. Everyone knew what the operative dates were and the underlying facts that needed to be established to determine if Mr. Sharkey qualified under the

statute.") Therefore, the agencies conduct falls outside the potential savings clause provided by section 6601, subdivision (a)(2), since real party's unlawful custody was not due to a mistake of law or fact. (See discussion Argument V, post.) Instead, real party's custody falls within the negligence or intentional wrongdoing by governmental officials' exclusion to section 6601, subdivision (a)(2), articulated in Hubbart, Whitley and Lyles. (People v. Hubbart (2001) 88 Cal.App.4th 1202, 1229, "[t]here was no evidence of any negligence or intentional wrongdoing here"; People v. Superior Court (Whitley) (1998) 68 Cal.App.4th 1383, 1390; Garcetti v. Superior Court (Lyles) (1998) 68 Cal.App.4th 1105, 1118, the revocation of parole "was without any hint of negligence or intentional wrongdoing by government officials.") Senate Bill 11 (Stats. 1999, ch. 136), § 3), states that section 6601, subdivision (a)(2), is declaratory of existing law of which Whitley's and Lyles's "negligence or intentional wrongdoing" language is a part. (Buckley v. Chadwick (1955) 45 Cal.2d 183, 200, the Legislature is presumed to have knowledge of existing judicial decisions and to have enacted and amended statutes in light of such decisions.)

The gravamen in the above-entitled case is not the failure to correctly apply and/or construe Regulation 2600.1, subdivision (d). It is based on the reality that there were no facts presented justifying a finding of good cause under section 6601.3 in the first place. Negligence was the exclusive cause for the delay. Because there were no facts justifying a finding of "exceptional circumstances" or "good cause," a hold pursuant to section 6601.3 and Regulation 2600.1 could never have been legitimately instituted. Negligence is not good cause, nor is it a good faith mistake of law or fact. It is the "failure to use a reasonably amount of care when such failure results in injury to

another." (Webster's New World Dict. (college ed. 1968) p. 982); Black's Law Dict. (4th ed. 1968) p. 1184, "[t]he failure to exercise ordinary care".)

The Litmon decision regarding the right to a speedy trial under the SVPA is informative regarding the two lengthy and unnecessary delays at issue in the above-entitled case. "The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property. . . ." (People v. Litmon (2008) 162 Cal.App.4th 383, 395, citations and internal quotations omitted.) "The minimum requirements of procedural due process are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action. The point is straightforward: the Due Process Clause provides that certain substantive rights-life, liberty, and property-cannot be deprived except pursuant to constitutionally adequate procedures. [¶] An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation. Even in situations justifying post-deprivation hearings, [a]t some point, a delay in the post-termination hearing would become a constitutional violation." (Id., at pp. 395-396.) "[A]ny chronic, systematic post-deprivation delays in SVP cases that only the government can rectify must be factored against the People." (Id., at p. 403.) Certainly, unjustified delay and erroneous application of section 6601.3 and Regulation 2600.1 in the above-entitled case exemplifies not only a negligent delay, but also a chronic and systematic delay which only the government can rectify.

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

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

The analysis of the presence of "good faith" in the above-entitled case is not dissimilar from that in People v. Superior Court (Small), supra, 159 Cal.App.4th 301. In Small the enactment of Jessica's Law in 2006 led to a massive growth in referrals for SVPA assessments which in turn caused the delay in conducting evaluations. The court ruled Small's unlawful custody was not the result of a good faith mistake of fact or law. (Id., at pp. 309-310, "The increased workload does not amount to a mistake of law or fact and is something that the Department of Corrections and Mental Health could have anticipated and prepared for.") Just as CDCR's logistical and personnel problems did not satisfy section 6601, subdivision (a)(2)'s, "good faith" requirement in Small, the negligent logistical and personnel problems attributable to both the BPH and CDMH in the above-entitled case does not even come close to satisfying the requirement of "good faith." The BPH

allowed real party's evaluation to languish for approximately five months because its parole agent did nothing on the case and the parole agent's supervisor failed to adequately supervise him and then waited three weeks to replace him once he was terminated. (See discussion ante.) Then the CDMH allowed one of its psychologists to unnecessarily prolong the completion of his report based on the conclusion that the case was "complex" notwithstanding the fact that he had already concluded in his Clinical Evaluation Summary that real party meet the SVPA criteria well before real party's parole date and despite the fact that the second evaluator completed his report approximately three weeks before real party's parole date. (See discussion ante.)

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

V

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

A petition filed pursuant to the SVPA "'should be dismissed if the unlawful custody was not the result of a good faith mistake of fact or law.'" (People v. Superior Court (Small), supra, 159 Cal.App.4th 301, 304, 308-309.) The trial court ruled that real party's custody was unlawful because there was no "good cause" to justify the 45-day hold and that there was no "good faith mistake of fact or law" excusing the unlawful custody. Accordingly the lower court correctly ruled: "It is true that no consequences expressly attach. However, the statute explicitly states when dismissal shall not be authorized, i.e., if the delay is caused by a good faith mistake of fact or law. Having listed

two excuses (or good cause) for avoiding dismissal, the Legislature could have added more. It did not. The court infers that absent those narrow, explicit excuses, dismissal is the appropriate remedy given, given the fact that the delay resulted in deprivation of liberty, a constitutional consideration." (Pet., Exh. 1, at p. 8.)

Section 6601, subdivision (a)(2)'s express language that "[a] petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law" implicitly, if not explicitly, requires the court to dismiss a SVPA petition if saving clause "the unlawful custody was the result of a good faith mistake of fact or law" is not satisfied. This statutory language is equivalent to a "negative pregnant." Section 6601, subdivision (a)(2), by specifically stating that a petition shall not be dismissed where the "custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law," while omitting any reference that dismissal is otherwise prohibited confirms the Legislature's intention to permit dismissals absent the limited circumstances specifically set forth by the statute itself. (In re Lucas, supra, 182 Cal.App.4th 797, 105 Cal.Rptr.3d 871, 876, "'[t]his necessarily implies that the petition should be dismissed if the unlawful custody was not the result of a good faith mistake.' (People v. Badura (2002) 95 Cal.App.4th 1218, 1224, 116 Cal.Rptr.2d 336.)".) In the above-entitled case, the unlawful custody was attributable to negligence does not fall within the ambit of section 6601, subdivision (a)(2).

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

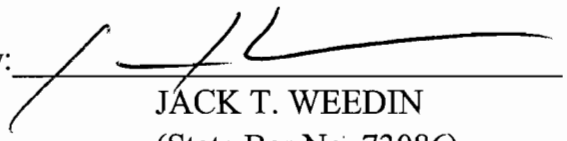
CONCLUSION

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

Respectfully submitted,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

Albert J. Menaster,
Karen King,
Jack T. Weedin,
Deputy Public Defenders

By: 

JACK T. WEEDIN
(State Bar No. 73086)
Deputy Public Defender

Attorneys for Real Party in Interest

CERTIFICATE OF COMPLIANCE
PURSUANT TO CALIFORNIA RULES OF COURT,
RULE 8.204, SUBDIVISION (c)(1)

I certify that the attached petition for review contains 12,252 words according to the word count of the computer program used to prepare the document.

DATED: July 14, 2010.

JACK T. WEEDIN
Deputy Public Defender

DECLARATION OF SERVICE

I, the undersigned, declare I am over eighteen years of age, and not a party to the within cause; my business address is 320 West Temple Street, Suite 590, Los Angeles, California 90012;

That on July 15, 2010, I served a copy of the within REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS, CHRISTOPHER SHARKEY, on each of the persons named below by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the City of Los Angeles, addressed as follows:

PAMELA C. HAMANAKA
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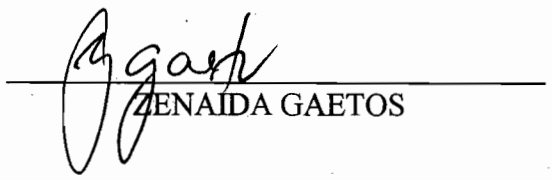
HONORABLE MARIA E. STRANTON
JUDGE, LOS ANGELES SUPERIOR COURT
DEPARTMENT 95
1150 NORTH SAN FERNANDO ROAD
LOS ANGELES, CA 90065

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

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

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

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 15, 2010, at Los Angeles, California.



ZENAIDA GAETOS