RICHARD A. CIUMMO & ASSOCIATES
Placer County Public Defender
Jonathan Richter, Chief Defense Attorney
Richard H. Kohl, State Bar No. 135231
Assistant Public Defender
11760 Atwood Road, Suite 4
Auburn, California 95603
Telephone: (530) 889-0280
Fax: (530) 889-0277

Attorneys for Petitioner David Lucas

IN THE SUPREME COURT OF CALIFORNIA

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

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I

THE REQUIREMENT OF "EXCEPTIONAL CIRCUMSTANCES" IN SECTION 2600.1(a) OF THE CODE OF REGULATIONS CLEARLY APPLIES TO 45-DAY HOLDS

A

Section 2600.1

Respondent argues in her answer brief that the requirement of exceptional circumstances in section 2600.1(a) of the Code of Regulations applies to 3-day holds, but not to 45-day holds under section 6601.3 of the Welfare & Institutions Code (Answer Brief on the Merits, pp. 23-27). The rules of statutory construction, and the rules of common sense, suggest otherwise.

Section 2600.1(a) states that:

> 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* (sic) *the person pursuant to section 6601 of the Welfare and Institutions Code* (emphasis added).

It is clear from the highlighted language that 3-day holds are merely intended to give CDCR breathing time to schedule a good cause hearing in cases where exceptional circumstances do not permit the SVP evaluation process to be completed prior to the inmate's release date, and do not even

permit the good cause hearing to be held prior to the release date. If the exceptional circumstances referred to in section 2600.1(a) applied only to 3-day holds, the section would read:

> 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 probable cause hearing pursuant to section 6601.3 of the Welfare and Institutions Code.*

Three-days holds have no legal basis except as they make it possible for CDCR to schedule a good cause hearing as provided by section 6601.3. Three-day holds do not exist apart from 45-day holds. Three-day holds are not mentioned in section 6601.3 or in the legislative materials that provide the background for section 6601.3.

Section 2600.1(e) provides that, "Holds imposed under this section ... will terminate no later than the 45th day following the scheduled release date." If the board imposed a 3-day hold, followed by a 45-day hold, the total length of the two holds would be 45 days, not 48 days – a further indication that 3-day holds operate only in conjunction with 45-day holds.

The parties in this case agree that the whole idea behind section 6601.3 of the Welfare and Institutions Code is that, due to circumstances beyond the control of the Department of Corrections, or the Department of

Mental Health, i.e., exceptional circumstances, additional time of up to 45 days may be needed to complete the SVP evaluation process in certain cases. Section 2600.1 of the Code of Regulations – and only section 2600.1 – implements section 6601.3 of the Welfare and Institutions Code. Where, according to respondent's view, did the exceptional circumstances requirement underlying section 6601.3 go, if not into section 2600.1(a)? Did it vanish into thin air?

According to respondent's view, CDCR simply neglected to include in section 2600.1, the exceptional circumstances requirement for 45-day holds, which is provided for by statute, but remembered to include an exceptional circumstances requirement for 3-day holds, which have no basis in the statute. Petitioner believes that argument would have been better left on the cutting room floor.

Section 2600.1(a) provides that 3-day holds "may" be imposed, not that they "must" be imposed, and that when imposed, they remain in effect for up to three days *beyond* the inmate's scheduled release date. It appears then, that 3-day holds are only intended to be imposed in cases where there is insufficient time even to hold a good cause hearing prior to the inmate's release date. It would make no sense to extend an inmate's release date for a good cause hearing, when, as in this case and in *Sharkey*, the board *is* able to

hold a good cause hearing prior to the inmate's release date.

If, on the other hand, 3-day holds *are* a prerequisite to 45-day holds in every case, it would be a further indication that, in this case, the Board acted without considering, much less relying on, section 2600.1.

Respondent argues that subsection (d) of section 2600.1 is invalid because 2600.1(d) does not contain a requirement of exceptional circumstances (Answer Brief, Argument II, pp. 28-33). As discussed above, petitioner believes the requirement of exceptional circumstances justifying 45-day holds is contained in subsection (a) of section 2600.1.

Subsection (d) of section 2600.1 is just that – a subsection. It is not a separate section. It was meant to be read, and would be read by a normal person, in connection with the other subsections of 2600.1.

As respondent points out:

> An interpretation [of a code section or regulation] 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. (Answer Brief, p. 9, citing *Lungren v. Deukmajian* (1998) 45 Cal.3d 727, 735.)

Reading the subsections of 2600.1 together, and harmonizing them to the extent possible, avoids an interpretation that renders section 2600.1(d) invalid. It furthers the purpose underlying section 6601.3 of the Welfare and

Institutions Code – to provide the agencies involved additional time, where necessary, to conduct good cause hearings and to complete SVP evaluations. Lastly, it leads to a far more reasonable result than the result suggested by respondent – that exceptional circumstances are required for 3-day holds, but not 45-days holds.

The justification for 45-day holds, as urged upon the legislature by the Department of Corrections, and as enacted by the legislature, is a simple one. In a limited number of cases, and through no fault of the Department of Corrections or the Department of Mental Health, there is insufficient time for the SVP evaluation process to be completed prior to the inmate's release date. This justification does not present difficult problems of statutory or constitutional interpretation. A child could understand it. If section 2600.1 does not clearly spell out the simple justification for 45-day holds, it is because the Department of Corrections was negligent in drafting section 2600.1. If a deputy commissioner on the Board of Parole Hearings did not understand exactly what 45-day holds were for, it was because the Department of Corrections failed to exercise a modicum of care in training or supervising him or her in that regard. These are not good faith mistakes of fact or law. These are just mistakes.

The two previous versions of section 2600.1, cited by respondent

(Answer Brief, p. 27) both require exceptional circumstances as a pre-condition to both 3-day and 45-day holds:

> (a) The purpose of this section is to provide a mechanism for screening parolees in revoked status and inmates under the Sexually Violent Predator Program (Welfare & Institutions Code section 6600 and following, chapter 763, statutes of 1995) 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. (Original section operative 1/1/96, Register 95, No. 52; amended section operative 1/24/97, Register 97, No. 4).

The two previous versions, like the present version, refer to exceptional circumstances that preclude an earlier SVP *evaluation*, not an earlier good cause hearing.

In the two previous versions, 3-day holds are described in subsection (b) and 45-day holds in subsection (c). There is no further mention or explanation of exceptional circumstances in either subsection (b) or (c).

There are differences between the two earlier versions of section 2600.1 (which are virtually identical to each other) and the present one, but the differences reflect changes in the SVP Act itself, not changes in the meaning or application of the requirement of exceptional circumstances as it applies to 45-day holds. The earlier versions of 2600.1 reflect the earlier versions of the SVP Act, which contemplated that not only the SVP evaluation, but the probable cause hearing conducted by the court, would

take place prior to the inmate's release date. The earlier versions also call for the inmate to be held at a Department of Mental Health Facility during the period of a 45-day hold.

B

Forfeiture

Respondent argues in her answer brief that petitioner has forfeited the argument that section 2600.1 of the Code of Regulations should be read as a whole, and that the requirement of "exceptional circumstances" in subsection (a) of 2600.1 applies to 45-day holds (Answer Brief, pp. 23-24). Petitioner did not raise this issue in the Court of Appeal. Nevertheless, petitioner believes the Court can consider this contention, and that it must do so in order to decide this case and the companion case correctly.

First of all, petitioner *Sharkey* has raised this issue in his opening brief, so the issue is already before the Court. Rule 8.200(a)(5) of the California Rules of Court provides:

> Instead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal.

Petitioner believes he would not be precluded from raising the issue of subsection 2600.1(a) at this stage even if petitioner in the companion case had not. In *People v. Randle* (2005) 35 Cal.4th 987 (cited by respondent,

Answer Brief, p. 24), a homicide case, the Attorney General argued in the Supreme Court that the defendant could not raise the defense of imperfect defense of others because the defendant had created the circumstances that led up to the killing. The defendant argued the Attorney General was precluded from making that argument because the Attorney General had not made that argument in the Court of Appeal. In the Court of Appeal, the Attorney General had argued instead that California did not recognize the doctrine of imperfect defense of others.

The Court stated:

> As a matter of policy, we generally will not consider on review any issue which could have been, but was not, timely raised in the Court of Appeal (citations). However, in a number of cases, this court has decided issues raised for the first time before us, *where those issues were pure questions of law, not turning on disputed facts,* and were pertinent to a proper disposition of the cause or involved matters of particular public importance (citations, emphasis in the original). *Randle*, pp. 1001-1002.

Pointing out that, "The facts underlying the Attorney General's arguments were undisputed.," the Court concluded the Attorney General was not precluded from making the new argument by his failure to make that argument in the lower court. *Randle*, p. 1002.

Similarly, on appeal following trial, a party may change the theory he relied upon at trial, so long as the new theory presents a question of law to be

applied to undisputed facts in the record. *Hoffman-Haag v. Transamerica Insurance Co.* (1991) 1 Cal.App.4th 10, 15; *Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 51.

Lastly, even where a *party* has failed to preserve an issue for review, a *reviewing court* retains discretion to address the issue, as long as the issue does not relate to the admission or exclusion of evidence. *People v. Williams* (1998) 17 Cal.4th 148, 161, fn 6; *People v. Smith* (2003) 31 Cal.4th 1207, 1215.

The argument that, under section 2600.1(a), exceptional circumstances must exist before the Board of Parole Hearings can consider imposition of a 45-day hold, is based on the language of section 2600.1(a), and the other subsections of 2600.1. There is no factual dispute as to what the regulation *says*. The regulation has been there, for both sides to see, all along. Respondent has had the same opportunity to argue what she believes the regulation *means* in this Court that she would have had in the Court of Appeal.

In petitioner's view, the Court cannot decide whether or not the Board of Parole Hearings relied, and relied in good faith, on the terms of section 2600.1 in this case and in *Sharkey* without considering all the provisions of section 2600.1.

II

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

A

The Board of Parole Hearings In This Case Ignored the Obvious Meaning and Purpose of Section 2600.1

Respondent argues that petitioner did not meet his burden of proving that the Board's action in this case was not the result of a good faith mistake of law, and that the decision of the Court of Appeal that he did not was correct:

> 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 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" (Answer Brief, p. 34).

Petitioner suggests, first of all, that there is no mystery regarding the facts underlying the Board's decision on October 9, 2008. The facts are set forth under the heading, "FACTS," on the decision form [Court of Appeal Petition Exhibit "I"]. If the Board had been relying on section 2600.1(d), if the Board had believed there was good cause, the Board would have said so.

The Board did not say so.

Aside from that, the problem with respondent's argument is that it is based on the unsustainable premise that the exceptional circumstances requirement in subsection 2600.1(a) applies to three-day holds, but not to 45-day holds, and that, therefore, subsection 2600.1(a) does not apply in petitioner's case. This reading of subsection 2600.1(a) renders it completely at odds with section 6601.3 of the Welfare & Institutions Code, which, the parties agree, *does* require that exceptional circumstances exist before a 45-day hold may be imposed.

Respondent, in Part I of her Answer Brief, argues that "good cause" in section 6601.3 should be interpreted so as to avoid defeating the purpose of the statute (Answer Brief, pp. 19-22).

In Part II of her Answer Brief, respondent argues that subsections (a) and (d) of 2600.1 should be read in such a way *as to defeat* the purpose of the statute and render them invalid (Answer Brief, pp. 23-27, pp. 28-33).

If the Board had so much as considered section 2600.1 in this case, it would have begun by considering the basic premise underlying 45-day holds — exceptional circumstances. That premise is set forth where you would expect to find it -- in the opening subsection of section 2600.1.

The link between exceptional circumstances and 45-day holds in

subsection 2600.1(a) would be clear even to a lay person. That link cannot be broken by ascribing exceptional circumstances to 3-day holds instead of 45-day holds. It is clear in subsection 2600.1(a) that the sole purpose of a 3-day hold is to permit the Board to schedule a hearing "pursuant to section 6601.3 of of the Welfare and Institutions Code," that is, a hearing to determine whether or not to impose a 45-day hold.

If the Board had been acting in good faith in petitioner's case, it would have opened his file, seen that nothing had occurred which could even remotely be described as exceptional, and would have acted accordingly.

In reaching its decision, the Court of Appeal in this case focused only on the question of whether or not the Board of Parole Hearings relied on subsection 2600.1(d). The Court of Appeal did not consider section 2600.1 as a whole, or subsection 2600.1(a) in particular, because the parties did not ask it to, and because it didn't, its decision was not based on substantial evidence. If the parties had focused on 2600.1(a) in the Court of Appeal, the outcome there would very likely have been different. Fortunately, petitioner in *Sharkey* raised the issue before it was too late.

B

The Legislature Did Not Intend that the Good Faith Mistake Exception of Section 6601(a)(2) Apply in Cases Where Unlawful Custody is the Result of Negligence

As respondent points out, the good faith exception was added to section 6601(a)(2) of the Welfare & Institutions Code in 1992 as a result of *Terhune v. Superior Court (Whitley)* (1998) 65 Cal.App.4th 864 *(Whitley I)* and *People v. Superior Court* (1999) 68 Cal.App.4th 1383 *(Whitley II)* [Answer Brief, pp. 37-40].

The court in *Whitley II* was careful to point out that negligence had not played any part in the decision to revoke Whitley's parole:

> As in *Dias* [*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 Whitley's 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. *Whitley II*, p. 1390.

In contrast to the situation in *Whitley*, and to the situation in *Hubbart* ("There is no evidence of any negligence or intentional wrongdoing here." *People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1229), negligence is precisely what brought petitioner's case about. The Department of Corrections simply lost track of petitioner for more than nine months, then negligently, or deliberately, ignored the clear language and purpose of section 2600.1

when it imposed the 45-day hold.

In contrast to the situation in *Whitley* and in *Hubbart,* section 2600.1, viewed as a whole, and viewed in light of the legislative purpose underlying section 6601.3 of the Welfare & Institutions Code, is not invalid at all. What is invalid is trying to read section 2600.1(a) in a way that serves only the purpose of justifying the Board's action, rather than in a way that serves the underlying purpose of the legislation.

C

The Court Can, and Must, Consider the Fact That the Department of Corrections Sponsored the Legislation Creating 45-Day Holds in Determining Whether the Board's Action in Petitioner's Case Was the Result of a Good Faith Mistake of Law

Petitioner argued in his opening brief that the Board's action in petitioner's case could not have been the result of a good faith mistake of law given that the Department of Corrections, of which the Board is a part, sponsored the legislation creating 45-day holds in the first place [Opening Brief, pp. 23-26]. Respondent argues that petitioner is precluded by the rules of forfeiture from making that argument at this stage because he did not make it in the Court of Appeal, and thus did not give respondent an opportunity to respond and offer evidence in opposition (Answer Brief, p. 43).

Respondent argues that the amendments to the Sexually Violent Predator Act in 2006 dramatically increased the number of inmates potentially subject to SVP commitment, and that this increase in workload prevented Board of Parole Hearings staff from researching the history and purpose of section 6601.3 (Answer Brief, p. 44). Respondent then argues, that had petitioner raised this issue in the Court of Appeal, she would have had the opportunity to present evidence regarding the increased workload (Ibid).

The first problem with the forfeiture argument in this context is that evidence regarding the effects of the 2006 amendments *was* presented to the court in *People v. Superior Court (Small)* (2008) 159 Cal.App.4th 301. The court considered exactly the same evidence respondent alludes to, and determined that the evidence did not excuse the failures of the agencies involved in that case:

> Accordingly, the question becomes whether Small's unlawful custody resulted from a good faith mistake of law or fact. The trial court found that the unlawfulness of Small's custody resulted from a delay on the part of Mental Health and not from either a legal or factual mistake. Notably, the People did not challenge this finding and our review of the record does not show any error in this regard. Rather, the Department of Corrections waited until a month before Small's release date to refer him to Mental Health for evaluation and Mental Health did not begin the evaluation process until near the end of Small's 45-day hold period.

> Although the People presented evidence showing that the passage of Jessica's Law in 2006 greatly increased the number of referrals to Mental Health (721 in Jan., 740 in Feb. and 673 in Mar.), it did not explain the initial delay in referring Small to Mental Health for evaluation or the delay in obtaining the evaluations (i.e., the number of inmates with earlier release dates than Small). The increased workload does not amount to a mistake of law and is something that the Department of Corrections and Mental Health could have anticipated and prepared for. *Small*, pp. 309-301.

The court came to a similar conclusion in *People v. Litmon* (2008) 162 Cal.App.4th 383, a case dealing with the issue of delays in bringing SVP cases to trial:

> In our view, any chronic, systemic postdeprivation delays in SVP cases that only the government can rectify must be factored against the People. While delays based upon the uncontrollable unavailability of a critical witness may be justifiable ... post-deprivation delays due to the unwillingness or inability of the government to dedicate the resources necessary to ensure a prompt SVP trial may be unjustifiable. *Litmon*, p. 403.

Secondly, a commissioner on the Board of Parole Hearings would not need to conduct "detailed research" to determine the purpose of section 6601.3. All he or she would need to do is *read* section 2600.1 of the Code of Regulations. The purpose of section 6601.3 is spelled out in plain English in subsection (a).

This case simply cannot be decided correctly without considering the role the Department of Corrections played in the enactment of section

6601.3. The fact that the Department of Corrections sponsored the legislation leads almost inescapably to the conclusion that the commissioner on the Board of Parole Hearings either knew, should have known, or could easily have determined, exactly what 45-day holds were for.

D

If The Board of Parole Hearings Did Rely on Section 2600.1(d) in Petitioners' Case, It Did Not Do So in Good Faith

Lastly, respondent argues that the Board of Parole Hearings acted in reliance on section 2600.1(d) in petitioner's case, and that the Board acted in good faith because the information available to it on October 9, 2008, showed that petitioner met the two criteria set forth in 2600.1(d) (Answer Brief, pp. 45-47).

According to the only record we have of the Board's decision, the only provisions of law the Board had in mind were sections 6600 et seq. and 6601.3 of the Welfare & Institutions Code (Court of Appeal Writ Petition Exhibit "I"). But even if the Board in fact was relying on section 2600.1(d), the Board could not *possibly* have been doing so in good faith, because, either negligently or deliberately, it would have been overlooking the exceptional circumstances requirement set forth in subsection 2600.1(a) in the process. As discussed in I, A, and II, A, above, a Board member acting

in good faith in petitioner's case would have read section 2600.1 – from the beginning – and would have understood that exceptional circumstances are required before a 45-day hold can be imposed. He or she would then have examined petitioners' prison file, and determined that there had been nothing preventing CDCR from completing the screening process and referring the case to the Department of Mental Health months before petitioner's release date.

CONCLUSION

The parties in this case agree that good cause did not exist for imposition of a 45-day extension of custody in petitioner's case. The Court of Appeal in petitioner's case came to the same conclusion. The Court of Appeal in *Sharkey* found that there was good cause; however that court did not have the material describing the legislative background of section 6601.3 (Lucas, Court of Appeal Traverse Exhibits "A" through "H") before it. Had that court known the legislative history of section 6601.3, the result there would very likely have been different.

The Court of Appeal in petitioner's case held that petitioner's custody, while unlawful, was the result of a good faith mistake of law as to subsection 2600.1(d) of the Code of Regulations. However, that court was not asked to consider, and did not consider, section 2600.1 in its entirety,

including subsection 2600.1(a). Had that court considered section 2600.1 as a whole, the result there would also likely have been different.

Petitioner contends, as he has all along, that his unlawful custody, and therefore this case, were the result of negligence on the part of the Department of Corrections – negligence in losing track of him for more than nine months, negligent -- or deliberate -- disregard of sections 6601.3 and 2600.1 in imposing the 45-day hold. Had the SVP evaluation process been completed prior to petitioner's release date, the Board of Parole Hearings would not have had to act at all. Petitioner's case would likely have proceeded to trial by now, and the parties and the Court would be be devoting their time to other matters instead.

Respondent does not really challenge that contention, other than to say – in passing – that the reasons for the delay in completing the SVP evaluation process "were irrelevant to the Board's determination of whether a 45-day hold should issue under the regulation" (Answer Brief, p. 42).

The lapse in the screening and evaluation process from December 21, 2007, until October 1, 2008, and the lack of any reason for it, cannot simply be overlooked. It must be accounted for. The parties, and the Court, can not simply pretend it didn't happen. If petitioner's unlawful custody was ultimately the result of negligence, the good faith clause of section

6601(a)(2) of the Welfare & Institutions Code does not apply, regardless of why the Board acted as it did on October 9, 2008.

In order for a 45-day hold to be imposed, there must be good cause. In order for there to be good cause, there must be exceptional circumstances. The circumstances leading up to the Board's action in this case could not possibly have been less exceptional. At the time the Board acted, petitioner had been in CDCR's custody, without interruption, for nearly five-and-a-half years. At the time the Board acted, the 2006 amendments to the SVP Act had been in effect for about two years. Assuming an SVP evaluation can be completed in 45 days, as eventually occurred in petitioner's case, there would have been time, between December 21, 2007, when the initial screening was conducted, and October 12, 2008, when petitioner was due to be released, to complete the SVP evaluation process *six times*.

The petition for writ of habeas corpus should be granted.

Dated: January 3, 2011

Respectfully submitted,

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

WORD-COUNT CERTIFICATE

I hereby certify, under penalty of perjury, that the foregoing Reply Brief on the Merits contains 4,710 words, as determined by the word-processing program used to prepare the brief.

Dated: January 3, 2011

Respectfully submitted,

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

PROOF OF PERSONAL SERVICE VIA US MAIL

The undersigned deposes and says:

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

That on January 4, 2011, I personally US mailed a true copy of

☐ Motion

☐ Petition

☒ Other: Petitioners Reply Brief on the Merits

on the below named:

Ms. Jennifer Poe
Deputy Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

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

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

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

District Attorney Office
Placer County
Attn: Todd Kuhnen
10810 Justice Center Drive, Suite 240
Roseville, CA 95678

Re: Client Name: DAVID LUCAS

Case Number: California Supreme Court Case # S181788

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

Executed January 4, 2011, at Auburn, California.

Julie Hendricks