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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re DAVID WOODROW SMITH, on Habeas Corpus.	B184548 (Los Angeles County Super. Ct. Nos. ZM007064, NA052811)

PETITION for writ of habeas corpus. Writ denied.

David Woodrow Smith, in pro. per.; and J. Courtney Shevelson, under appointment by the Court of Appeal, for Petitioner.

Steve Cooley, District Attorney, Brentford J. Ferreira, Phyllis C. Asayama and Rebecca Marie Madrid, Deputy District Attorneys, for Respondent.

Petitioner David Woodrow Smith challenges his confinement as a sexually violent predator (SVP) on the ground that the conviction that brought him into the SVP evaluation and commitment system was invalidated after the SVP commitment petition was filed. We deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

In 1982, Smith was convicted of four counts of oral copulation on a child under the age of 16 (Pen. Code, § 288a, subd. (b)(2)) and one count of sodomy of a child under the age of 16 (Pen. Code, § 286, subd. (b)(2)). In 1988, Smith was convicted of 15 counts of committing lewd and lascivious acts on a child under the age of 14 (Pen. Code, § 288, subd. (a).) Smith was released on parole in July 1995 and completed parole in July 1998.

Because of his prior offenses, Smith was obligated to register as a sex offender. (*People v. Smith* (2004) 32 Cal.4th 792, 795 (*Smith*).) In April 1999 Smith moved to Colorado from California; then, nine days later, he moved to New York. (*Ibid.*) He claimed that he sent a change of address card for his Colorado address to the Long Beach Police Department on April 12, 1999, but the officer responsible for sex offender registration testified that he did not receive any such card. (*Ibid.*) When Smith did not appear in September 1999 to complete his annual registration, the Long Beach police began searching for him. (*Ibid.*) Smith was arrested in New York. (*Ibid.*)

Convicted of failing to register as a sex offender (Pen. Code, § 290, subd. (g)), Smith was sentenced to five years in state prison on October 26, 2000. (*Smith*, *supra*, 32 Cal.4th at pp. 796-797.) The Court of Appeal affirmed his conviction on June 18, 2002. Smith petitioned for review of his conviction in the California Supreme Court, which granted review on September 18, 2002.

Smith asserts that he was scheduled for release on parole on January 6, 2004. While incarcerated, he was referred by the Department of Corrections and the Board of Prison Terms to the Department of Mental Health for evaluation as a potential SVP. On

December 15, 2003, the District Attorney filed a petition for Smith's commitment as a SVP pursuant to Welfare and Institutions Code section 6600 et seq. (the "SVP Act").[1] Smith claims that he refused the scheduled January 2004 parole and voluntarily extended his prison term in order to continue medical treatment for throat cancer. He anticipated being released on March 2, 2004, but was instead transferred to the custody of the Los Angeles County Sheriff.

On March 29, 2004, the Supreme Court reversed Smith's conviction in *Smith*, *supra*, 32 Cal.4th 792, because the jury had been improperly instructed. The District Attorney elected not to refile charges against Smith, who had already served the majority of his sentence by the time his conviction was reversed.

Smith objects to the trial court conducting any proceedings on the SVP petition while he challenges the court's authority to proceed given the reversal of his conviction for failure to register and has obtained numerous continuances of his probable cause hearing while he litigates the issue. He has filed multiple habeas corpus petitions contesting the trial court's jurisdiction to continue with SVP proceedings given the reversal of his conviction for failure to register. One petition was denied by the California Supreme Court (S130058, Feb. 2, 2005) on procedural grounds. The trial court denied Smith's next petition on the ground that he had not established a prima facie case for relief.

Smith filed the instant habeas corpus petition with this court on July 20, 2005. After this court requested and received a brief in opposition to the petition, we issued an order to show cause and appointed counsel for Smith on October 21, 2005. The parties subsequently filed supplemental briefing, the return, and a traverse. After oral argument, the court requested additional briefing, which was provided by the parties.

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

DISCUSSION

The SVP Act targets individuals presently in prison for any offense or after a parole revocation who have been convicted of a sexually violent offense—as defined by statute—against two or more victims, and who currently have "a diagnosed mental disorder" that makes them "a danger to the health and safety of others in that it is likely that [they] will engage in sexually violent criminal behavior." (§ 6600, subds. (a)(1) & (b); § 6601, subd. (a)(1).) As such a prisoner's release date approaches, the Director of Corrections and the Board of Prison Terms are required to screen the inmate as a potential SVP. (§ 6601, subds. (a) & (b).)

In the event that the screening indicates that the offender is a potential SVP, he or she is referred for evaluation by two psychologists or psychiatrists. (§ 6601, subds. (b) & (d).) If after examining the prisoner both professionals agree that he or she "has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody," an involuntary commitment petition may be filed. (§ 6601, subds. (d) & (i).) When there is a split of opinion between the examiners, independent professionals are brought into to evaluate the inmate, and a petition may be filed only if both independent examiners believe that he or she meets the criteria for involuntary commitment. (§ 6601, subds. (e) & (f).)

What happens when an SVP petition has been filed, and then the conviction that put the offender in prison in the first place is overturned? The SVP Act makes no provisions for this specific circumstance, although section 6601, subdivision (a)(2) provides that a petition for commitment "may be filed . . . if the individual was in custody pursuant to his or her determinate prison term, parole revocation term, or a hold placed pursuant to Section 6601.3, at the time the petition is filed. A petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law." Smith argues that the language of the SVP Act, constitutional law, and principles of equity dictate that the SVP proceedings be dismissed in this

situation. The District Attorney argues that as long as the confinement was in good faith, its later determination to have been unlawful is not fatal to the petition. We look to the SVP Act, its purpose and history, and the limited case law interpreting the SVP Act, and conclude that the reversal of Smith's conviction after SVP proceedings had begun does not bar the completion of those SVP proceedings.

I. The reversal of Smith's conviction does not preclude the court from continuing with SVP proceedings that had already begun.

Smith contends that because an offender who meets all the requirements of confinement for an SVP but is not presently in prison cannot be involuntarily civilly committed under the SVP Act, the reversal of an imprisoned offender's conviction during the pendency of SVP proceedings bars any further action on the SVP petition. Smith's argument glosses over the difference between the initiation of proceedings and their continuation. If Smith had been released from prison before the SVP petition was filed and his conviction reversed, no petition could have been instituted against him absent a new conviction and sentence. But by the time Smith's conviction was reversed, the SVP petition process had already begun, and Smith was well past screening or evaluation. No longer was the question whether Smith met the initial screening criteria: the inquiry was whether there was probable cause to believe that Smith had committed a qualifying sexually violent offense in the past and that he currently had a diagnosed mental disorder that made him "a danger to the health and safety of others in that it is likely that he . . . will engage in sexually violent criminal behavior"—sexually violent predatory criminal behavior—upon release. (§ 6600, subd. (a)(1); *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 247-249 [probable cause determination and trial both concern the four elements of determination as an SVP].) Nothing in the statutory provisions concerning SVP trials requires or suggests that once a petition has been lawfully filed for a then-eligible inmate, a change in a screening factor would bring to a halt the advanced proceedings.

While the language of the SVP Act does not mandate that SVP proceedings go forward after a conviction is reversed, section 6601, subdivision (a)(2) suggests the Legislature intended that legal defects rendering a custody unlawful, provided that they are not made in bad faith, are not fatal to the SVP proceedings. Section 6601, subdivision (a)(2) has not been applied in a case such as this where an underlying conviction was reversed. It has, however, been applied repeatedly in a somewhat analogous context: illegal parole revocation. In *People v. Wakefield* (2000) 81 Cal.App.4th 893, at pages 896-897, the offender was in prison due to a parole revocation at the time that an SVP petition was filed against him. The parole revocation was later determined to have been unlawful. (*Id*. at p. 898.) The court rejected Wakefield's argument that the SVP proceedings instituted while he was in unlawful custody were therefore invalid, commenting that with section 6601, subdivision (a)(2), "the Legislature has made it absolutely clear that . . . lawful custody has never been a jurisdictional prerequisite to filing an SVP petition; a later judicial or administrative proceeding determination the custody was unlawful does not deprive the court of the power to proceed on an SVP petition if the custody status when the petition was filed was a result of a good faith mistake of law or fact." (*Ibid*.) Because Wakefield's presence in custody was due to good faith mistakes of both law and fact, the fact that he should not have been in custody at the time the SVP petition was filed did not invalidate the SVP proceedings against him. (*Id*. at pp. 898-899.)

Similarly, in *People v. Superior Court* (1999) 68 Cal.App.4th 1383, an inmate whose parole was revoked unlawfully, Whitley, was held to be properly subjected to the SVP process despite the impropriety of his parole revocation. In that case, the SVP petition was filed *after* the Court of Appeal determined that Whitley's parole revocation was invalid but before the decision became final. (*Id*. at p. 1389.) The court concluded that Whitley's improper parole revocation was due to a mistake of law concerning the Department of Corrections's parole authority and not to negligent or intentional wrongdoing. (*Id.* at pp. 1389-1390.) There was no suggestion of bad faith in the procedure: prior to Whitley's own case, no decision had held the parole revocation

procedure at issue to be invalid. (*Id*. at p. 1390.) "Given these factors and in light of the serious public safety purpose underlying the Act," the Court of Appeal wrote, "we conclude that despite the department's legal error, the trial court had jurisdiction or power to consider the People's latest petition for Whitley's commitment." (*Ibid*.)

The "serious public safety purpose underlying the [SVP] Act," mentioned in passing by the court in *People v. Superior Court*, *supra*, 68 Cal.App.4th at page 1390, strongly suggests that the SVP Act is intended for application to all individuals in custody, whether or not the custody is legal, unless the prisoners' illegal custody is due to bad faith conduct. This is consistent with the law's genesis. The SVP Act, like many other state involuntary commitment laws, was a legislative response to public outcry against violent crimes, particularly those of a sexual nature, being committed by individuals soon after their exit from prison, and the perceived inadequacies of federal sexual offender laws. During the 1990s, several violent and highly-publicized sexual assaults committed by recently-released felons with extensive histories of sexual crime fueled an intense public demand for stronger protection from sexual offenders. (Comparet-Cassani, *A Primer on the Trial of a Sexually Violent Predator* (2000) 37 San Diego L.Rev. 1057, 1060-1062 (hereafter *Primer*).) A trio of federal laws named after victims Jacob Wetterling, Megan Kanka, and Pam Lyncher required the states to improve procedures for monitoring sex offenders. (*Primer*, *supra*, 37 San Diego L.Rev. at pp. 1060-1065.)

These federal laws were perceived to be insufficient to combat the problem of sexually dangerous criminals rejoining the general population only to offend again. "Even with these laws in place, public concern continued, fueled by the perception, right or wrong, justified or not, that the current justice system did not adequately address the need to protect the public from one specific group of violent offenders—the sexually violent predator. [¶] A sexually violent predator is an individual who is a member of a subclass of the most highly dangerous violent offenders. They are the least likely to be cured and the most likely to reoffend, and they prey on the most vulnerable members of society—children and strangers. Even though the Jacob Wetterling Act requires sexually

violent predators to register, neither that Act nor any other law requires treatment of the individual, if needed, nor a determination of whether the person had a mental abnormality or was a continuing threat to the community. Additionally, no laws prevented the individual's release, even though the individual needed treatment and presented a present danger to the safety of others. In other words, none of the former laws addressed the fact that sexually violent predators were being released, untreated, into communities. The magnitude of the problem that confronted law enforcement, in terms of the number of sexually violent predator offenders who were being released into communities, and the statistical information about their rate of recidivism were crucial factors which influenced the enactment of the Sexually Violent Predator Act." (*Primer*, *supra*, 37 San Diego L.Rev. at pp. 1065-1067 [footnotes omitted].)

Responding to these concerns, the California Legislature enacted the SVP Act in 1995 to create an involuntary "civil commitment procedure to allow the state a means to place and treat sexually violent predators in a secure mental facility following their release from prison." (Assem. Com. on Public Safety, analysis of Assem. Bill No. 888 (1995-1996 Reg. Sess.) as amended Apr. 17, 1995, p. 6; see *Primer*, *supra*, 37 San Diego L.Rev. at p. 1075, fn. 120.) In an uncodified statement accompanying the SVP Act, the Legislature described its intent:

"The Legislature finds and declares that a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders can be identified while they are incarcerated. These persons are not safe to be at large and if released represent a danger to the health and safety of others in that they are likely to engage in acts of sexual violence. The Legislature further finds and declares that it is in the interest of society to identify these individuals prior to the expiration of their terms of imprisonment. It is the intent of the Legislature that once identified, these individuals, if found to be likely to commit acts of sexually violent criminal behavior beyond a reasonable doubt, be confined and treated until such time that it can be determined that they no longer present a threat to society.

"The Legislature further finds and declares that while these individuals have been duly punished for their criminal acts, they are, if adjudicated sexually violent predators, a continuing threat to society. The continuing danger posed by these individuals and the continuing basis for their judicial commitment is a currently diagnosed mental disorder which predisposes them to engage in sexually violent criminal behavior. It is the intent of the Legislature that these individuals be committed and treated for their disorders only as long as the disorders persist and not for any punitive purposes." (Stats. 1995, ch. 763, § 1.)

The purpose of requiring the SVP petition to be filed while the offender is "in custody is twofold: public protection and ensuring treatment to the dangerous mentally ill." (Assem. Com. On Public Safety, analysis of Sen. Bill No. 11 (1999-2000 Reg. Sess.) as amended April 6, 1999, p. 4.) Because of this focus on the public purpose of preventing the release into the community of sexually violent offenders until they are no longer likely to offend again, the reason why the offender is in custody at the time of screening is not relevant to the SVP process or determination.[2] What matters to the start of the SVP process is *that* inmates are in custody and are soon to be released, not *why*. (See *People v. Badura* (2002) 95 Cal.App.4th 1218, 1224-1225 [reason for the custody requirement in the SVP scheme is "to protect the public—to ensure that an alleged violent sexual predator is not loosed upon the world"].)

In this way the SVP process diverges markedly from California's former civil commitment system for sexual offenders, the mentally disordered sex offender (MDSO)

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[2] Indeed, the drafters of the SVP Act were so focused on ensuring the isolation from the public of sexually dangerous offenders that the bill, as introduced, was not limited to imprisoned felons. The original SVP bill would have allowed the return to custody for evaluation and potential civil commitment of a possible SVP not in the custody of the Department of Corrections provided that the individual had committed "a recent overt act that indicates that he or she is likely to engage in sexually violent criminal behavior if not evaluated and committed." (Assem. Bill No. 888 (1995-1996 Reg. Sess.) as introduced Feb. 22, 1995, § 3, proposed § 6601, subd. (e).) Provisions permitting the involuntary civil commitment of individuals not in custody were removed by amendments prior to enactment.

scheme. The former MDSO system permitted MDSO proceedings to be instituted only upon a conviction for a sexual offense. (Former § 6302, repealed by Stats. 1981, c. 928, p. 3485, § 2.) MDSO treatment amounted to a pre-sentencing diversion for treatment for the subject sex crime: MDSO commitment proceedings suspended sentencing proceedings, which then resumed if the offender was determined not to be an MDSO or when the MDSO was determined not to be a danger to others and not in need of further treatment. (*In re Bevill* (1968) 68 Cal.2d 854, 861 (*Bevill*).) Time under involuntary commitment was credited toward an eventual sentence for the sexual offense. (*Ibid*.) SVP proceedings, in contrast, are entirely distinct from convictions and sentencing for sex offenses—not only does the SVP commitment follow the completion of any sentence that has been imposed, but the offense that leads to the present incarceration need not even be sexual in nature. It is the offender's history of sexually violent crimes, regardless of whether the current conviction is for a sexually violent offense, combined with the existence of a mental disorder that makes it likely that the offender will commit further violent sexual crimes, that provides a basis for involuntary civil commitment as an SVP.[3]

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[3] This central difference between the MDSO and SVP systems make *In re Bevill*, *supra*, 68 Cal.2d 854, inapposite in the SVP context. In *Bevill*, the California Supreme Court held that when an MDSO's underlying conviction is invalidated, the commitment cannot stand because conviction and commitment are inextricably intertwined under the MDSO scheme. (*Id.* at pp. 861-863.) The Supreme Court observed "the integral and continuing relation foreseen to exist between commitment and conviction. The criminal proceedings are 'adjourned' when commitment proceedings commence. If the subject is immediately determined not to be a mentally disordered sex offender, criminal proceedings are resumed. If the subject is tentatively determined to be a mentally disordered sex offender, he is committed for 90 days and then returned to court. Upon his return, he is either finally committed or sentenced. . . . If an individual is eventually found not amenable to further treatment and not a danger to others, he is returned to court for sentencing. . . . If a person is found not amenable to further treatment and a continuing danger to others, he may be either recommitted or sentenced." (*Id*. at p. 861 (citations omitted).) As there is no corresponding interconnectedness in the SVP system, *Bevill*'s reasoning about the MDSO system is not persuasive with respect to the SVP Act. (See *People v. Superior Court*, *supra*, 68 Cal.App.4th at p. 1391 ["The requirement that proceedings under the Act must be initiated while the defendant is incarcerated is not equivalent to the valid conviction prerequisite discussed in *In re Bevill*. . ."].)

The SVP Act is concerned with the present offense or conviction only for gatekeeping and administrative purposes. First, incarceration is a hook to identify the subject population: the requirement of a present conviction defines the target population subject to SVP screening and subsequent proceedings as the universe of prison inmates. This is of course due to, and consistent with, the stated legislative motivation of preventing sexually violent offenders who are likely to offend again from rejoining the general population. Second, the prior conviction offers a mechanism for allocating SVP proceedings by county. Rather than burden the district attorney's office or the courts in the vicinity of state prisons with all the involuntary commitment proceedings pertaining to the inmates held there, the responsibility is spread by directing SVP proceedings to be heard in the county where the offender's conviction leading to the present incarceration took place. Once the screening is performed and the court in which to proceed is identified, the present conviction ceases to be relevant to the SVP process, which focuses entirely on the question of whether the inmate who has committed sexually violent and predatory crimes in the past has a mental disorder such that it is likely that he or she will reoffend if released without treatment. (§§ 6600, 6602, 6604.) This is in keeping with the legislative goal of preventing the release of a class of sexually dangerous offenders into the populace.

Section 6601, subdivision (a)(2) also reflects the primacy of the Legislature's intent to keep violent sex offenders out of the community over concerns about the legality of their confinement. The SVP Act expressly permits commitment proceedings to continue even if the custody on which they were initially premised turns out to be unlawful, provided that it was not in bad faith, in order to ensure that prisoners who are likely SVPs are not able to avoid the SVP process if their custody is later found to be unlawful. The Legislature explained the purpose for this provision: "[W]here a petition for commitment of a sexually violent predator has been filed, it is not the intent of the Legislature that a person be released based upon a subsequent judicial or administrative finding that all or part of a determinate prison sentence, parole revocation term, or a hold placed pursuant to Section 6601.3, was unlawful." (Stats. 1999, c. 136 (S.B.11), § 3.)

Similarly, the bill's author described the amendment's reasoning as follows: "[T]he purpose of this bill is to clarify the application of the SVP law to prevent the unintended and dangerous release of an offender pending determination of an SVP petition." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 11 (1999-2000 Reg. Sess.) as amended Apr. 6, 1999, p. 5.)

Smith is correct that section 6601, subdivision (a)(2) refers to a sentence, rather than a conviction, being invalidated, and that nothing in the legislative history of the section signals a specific intent by the Legislature for this provision to apply when the underlying conviction that caused the offender to be in prison and subject to the SVP process is later invalidated. But the Legislature, like the judicial system, has never confronted a situation such as this in which the inmate's custody was unlawful because his conviction was invalid. While the Legislature did not appear to consider the present situation in enacting section 6601, subdivision (a)(2), its enactment is certainly broad enough to encompass the present facts: at the time of the petition, Smith was in custody, a custody later determined to be unlawful but in good faith. Application of section 6601, subdivision (a)(2) here appears entirely consistent with the Legislature's overarching intent to keep SVPs in custody and the statute's language permitting SVP proceedings to continue even if an inmate is unlawfully held at the time of the petition as long as that error is made in good faith.

Smith, however, contends that section 6604 demonstrates that the Legislature actually did not intend the SVP Act to apply to those in his position. Section 6604 provides that if the court or jury hearing the trial on an SVP petition is not convinced beyond a reasonable doubt that the offender is a sexually violent predator, "the court shall direct that the person be released at the conclusion of the term for which he or she was initially sentenced, or that the person be unconditionally released at the end of parole, whichever is applicable." Smith points out that this provision assumes that the underlying conviction will remain valid so that if the offender is not committed as an SVP, the prior sentence and/or parole period will continue in force. We agree with Smith that this assumption is implicit in the phrasing of this section, but a provision concerning

what happens if an inmate is tried but not involuntarily committed falls far short of mandating that a pending petition be dismissed if the offender's conviction is reversed. Section 6604 simply does not offer guidance on the issue that faces this court.

Provided that there was a conviction in place at the time the petition was filed and that any unlawful custody was a result of a good faith mistake of fact or law, the reversal of an offender's conviction is not fatal to already-initiated SVP proceedings because of the other procedural safeguards afforded to protect the rights of potential SVPs. "We do not believe that an [SVP Act] commitment resulting from unlawful custody violates due process where, as here, the unlawful custody was the result of a good faith error and where, as here, the SVP is provided with numerous procedural safeguards. A person in unlawful custody who is alleged to be an SVP still has all of the procedural safeguards that the [SVP Act] provides in order to decrease the risk of an erroneous liberty deprivation. A petition for commitment may only be filed if two psychologists or psychiatrists concur that the person meets the criteria for commitment as an SVP. [Citation.] Thereafter, the person has the right to a probable cause hearing. [Citation.] Finally, the person has the right to trial by jury, at which the People must prove beyond a reasonable doubt that he or she is an SVP. [Citation.] The person has the right to the assistance of counsel at both the probable cause hearing and at trial. [Citation.] At trial, the person also has the right to retain experts and has access to all relevant medical and psychological reports. [Citation.] [¶] In light of the procedural safeguards provided to a person alleged to be an SVP, we conclude there is no due process violation where the person was not in lawful custody at the time the petition was filed." (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1230; see also *People v. Hayes* (2006) 137 Cal.App.4th 34, 48 [describing the probable cause hearing as "a mandatory procedural safeguard," its deprivation of a "proper, adversarial" probable cause hearing as "a denial of procedural due process," and observing that "A probable cause hearing is a crucial part of the panoply of procedural safeguards in the [SVP Act]. It must be conducted at the early stages of the judicial proceedings on an SVP petition"].)

These procedural safeguards are essential not only to the continuation of SVP proceedings when the offender is unlawfully in custody, but to the Act's very constitutionality. In *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, the California Supreme Court emphasized the indispensability of the various protections built into the SVP Act, such as the requirement that the trier of fact find that an SVP possesses an inability to control sexually violent behavior at the time of commitment, so that a person who "is not likely to commit sexually violent crimes and does not pose a present and substantial threat to public safety" cannot be committed (*id*. at p. 1162); the relatively brief maximum length of each term of commitment (*id*. at pp. 1166-1167); the annual mental evaluation and annual judicial review of the confinement, "providing the SVP with an opportunity to receive unconditional release and discharge in the event his condition has materially improved" (*id*. at p. 1167); the availability of conditional supervised release during the term of commitment if appropriate (*id*. at p. 1167); the limited evidentiary role of prior sexually violent offenses and limiting instructions to the jury at trial to ensure that commitment only occurs when the offender meets the definition of an SVP, not as additional punishment for past criminal acts (*id*. at p. 1175); the requirement that in order to extend commitment past two years the state must file a new petition and again prove beyond a reasonable doubt that the person is an SVP (*id*. at p. 1177); the burden of proof at trial (*ibid*.); the availability of release during a term of commitment if the Department of Mental Health so requests and it is clear that the conditions underlying commitment no longer exist. (*Ibid*.) "Viewed as a whole," the Supreme Court concluded, "the SVP[Act] is . . . designed to ensure that the committed person does not 'remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.' [Citation.]"[4]

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[4] We understand from the parties' supplemental briefing that the reason that Smith has not yet received the benefit of these procedural safeguards is that he has consistently opposed any action with respect to the pending SVP petition, even the probable cause hearing, while he litigates the court's jurisdiction to proceed on it.

Given the SVP Act's structure, its explicit and gravely important purpose of preventing sexually predatory offenders from leaving prison while they pose a danger to the community, and the procedural safeguards it extends to protect the rights of potential and adjudicated SVPs, we cannot accept Smith's argument that a valid prior conviction is fundamental to SVP eligibility. Smith's contention is not consistent with the public protection purpose of the law as set forth in the legislative history and as evidenced both in its overall structure and provisions such as section 6601, subdivision (a)(2). In the absence of a custody in bad faith, to exempt a potential SVP from the SVP Act because his conviction leading to the present custody was overturned "would fail to satisfy the purposes of the SVP law, i.e., to identify, confine, and treat individuals who have diagnosable mental disorders which predispose them to engage in sexually violent criminal behavior." (*People v. Butler* (1998) 68 Cal.App.4th 421, 440 [holding that sexually violent offenses committed outside of California qualify as predicate offenses under the SVP Act].)

The expansive, general language of section 6601, subdivision (a)(2) may in fact sweep more broadly than the Legislature envisioned when it enacted this provision to codify existing case law concerning unlawful custody that results from a miscalculated sentence, improperly-revoked parole, or other such sentencing-related defect. Should the Legislature conclude that it wishes to restrict the types of unlawful custody that are not fatal to an SVP petition to those instances, while excluding situations such as this in which the unlawful custody is due to an invalid conviction, a narrowing and clarifying amendment of section 6601, subdivision (a)(2) is within its jurisdiction. The language of the SVP Act as presently written, however, read in the context of its legislative history, compels the conclusion that the reversal of Smith's conviction for failure to register as a sex offender does not preclude the completion of previously-initiated SVP proceedings against him.

II. Smith's custody was unlawful but in good faith.

Smith contends that even if section 6601, subdivision (a)(2) applies here, he should be released because the mistake of law leading to his presence in custody was not in good faith. The record does not support this assertion. Smith's conviction was reversed because the trial court made an error of statutory interpretation when it attempted to provide jurors with guidance in response to a question submitted during deliberations. There is no indication in the record that this error was made without good faith. The trial court's interpretation was sufficiently reasonable that it was affirmed by this court (*People v. Smith* (June 18, 2002, B146786) [nonpub. opn.]), although one justice dissented. When the case reached the Supreme Court, it observed that "both parties . . . advanced reasonable interpretations" of the law at issue. (*Smith*, *supra*, 32 Cal.4th at p. 798.) Smith's unlawful custody was due to a good faith mistake of law.

III. Smith's remaining contentions

Smith makes a number of additional contentions in his habeas corpus petition, none of which is meritorious. First, Smith's initial argument, that the trial court lacked jurisdiction to accept the SVP petition because his conviction was on appeal, relies on inapposite authorities. Code of Civil Procedure section 916, governing civil appeals, has no application to these facts, and *People v. Perez* (1979) 23 Cal.3d 545, 554, *People v. Lockridge* (1993) 12 Cal.App.4th 1752, 1757, *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1089-1090, *People v. Malveaux* (1996) 50 Cal.App.4th 1425, 1434, fn. 3, and *Betz v. Pankow* (1993) 16 Cal.App.4th 931, 938 all state the general rule that the filing of a notice of appeal prevents the trial court from taking further substantive action on that cause or making orders affecting the judgment until the appeal is resolved; some discuss exceptions to the rule. Neither the general rule nor its exceptions are relevant here, as we are not presented with a trial court taking further action with respect to a criminal conviction that was on direct appeal, but with a distinct involuntary civil commitment procedure, a civil action based on a different nucleus of operative facts. While Smith's subjection to the SVP screening process was based on his presence in

prison because of the conviction as well as his prior offenses, that does not render the civil commitment proceedings a portion of or an integral part of the criminal judgment on appeal. At the time the SVP petition was filed, Smith was in custody, convicted of failure to register as a sex offender. While that conviction was later overturned, it was at that time a valid, if challenged, conviction. The petition was lawfully filed and accepted. (See, e.g., *Garcetti v. Superior Court* (1998) 68 Cal.App.4th 1105, 1118 ["even though the instant petition for commitment under the SVP Act was not filed until after Lyles should have been released from custody, these circumstances did not preclude the trial court from considering the People's petition for commitment on the merits. Although [a court] subsequently determined that such revocation of parole was unauthorized, *at the time the People sought to commit Lyles as a sexually violent predator,* his parole had been revoked and he was actually in custody"].)

Smith contends that he is being seized in violation of the Fourth Amendment because he is not facing additional criminal charges and because the SVP Act's requirement of imminent dangerousness does not require a recent overt act. Smith's argument is based on erroneous characterizations of statutes and judicial decisions. First, the Court of Appeals for the Ninth Circuit did not hold in *Suzuki v. Yuen* (9th Cir. 1980) 617 F.2d 173, 178 that the imminent danger posed by an involuntarily committed person must be evidenced by a recent overt act, attempt, or threat. The language Smith cites is from the trial court's decision; the Court of Appeals imposed no such overt act requirement, writing, "We agree [with the trial court] that the danger must be imminent to justify involuntary commitment." (*Ibid.*) That court struck down the commitment law in question "[b]ecause it is unconstitutional to commit one who does not pose an imminent danger." (*Ibid.*) Second, Smith is incorrect in his assertion that the SVP system differs from other California involuntary commitment schemes because it lacks a requirement of a recent overt act. "While there is no need for proof of a recent overt act while the offender is in custody (Welf. & Inst. Code, § 6600, subd. (d)), it is clear that the [SVP Act] permits civil commitment only upon a finding that the person has *current* psychological symptoms that render him or her likely to reoffend. [¶] The [SVP Act's]

requirement of a current mental condition and current dangerousness is similar to the requirements of the other civil commitment schemes. Contrary to defendant's assertion, the other civil commitment schemes do not require proof of a recent overt act." (*People v. Hubbart*, *supra*, 88 Cal.App.4th at pp. 1219-1220 [describing the various commitment acts' provisions and comparing them to the SVP Act].) We note that the requirement of current dangerousness for SVP commitment has been approved by the California Supreme Court against constitutional challenges and that it is quite similar to the standard endorsed by the United States Supreme Court in *Kansas v. Hendricks* (1997) 521 U.S. 346, 356-360. (*Hubbart v. Superior Court*, *supra*, 19 Cal.4th at pp. 1153-1158.)

Smith also argues that his continued detention violates Penal Code section 1180, and that it violates his Fifth and Fourteenth Amendment due process rights for the court not to return him to the position he was in before his conviction by ending the SVP proceedings against him, because that statute obligates the court to eradicate all consequences of the conviction. Penal Code section 1180 states, "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict or finding cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the accusatory pleading." This provision concerns subsequent criminal trials after a reversal of a conviction. Certainly pursuant to Penal Code section 1180, any punishment Smith received as a result of the conviction was necessarily vacated by the reversal, but civil commitment under the SVP Act is not punishment. (Stats. 1995, ch. 763, § 1 ["It is the intent of the Legislature that these individuals be committed and treated for their disorders only as long as the disorders persist and not for any punitive purposes"]; *Hubbart v. Superior Court*, *supra*, 19 Cal.4th at pp. 1174-1179 [SVP Act not punitive]; see also *Kansas v. Hendricks*, *supra*, 521 U.S. at pp. 361-369 [similar civil commitment scheme not punitive in nature].) Nothing in Penal Code section 1180 or the cases interpreting it establishes or suggests that the civil commitment proceedings, for which Smith was eligible to be screened because he was serving a

determinate sentence, must be halted once begun because the conviction that landed Smith in custody was later invalidated.

Finally, Smith argues that his continued detention violates his equal protection rights under the Fourteenth Amendment to the United States Constitution because he is being treated differently than others in his same position. "The constitutional guaranty of equal protection of the laws means simply that persons similarly situated with respect to the purpose of the law must be similarly treated under the law. [Citations.] If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold. [Citation.]" (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.) Smith has not established that he has been treated differently from others who are similarly situated. When Smith began the SVP screening process, he was treated in the same manner as other inmates serving a determinate sentence and nearing their parole date who had previously been convicted of sexually violent offenses: he was screened as a potential SVP. After his evaluation, an SVP petition was filed to involuntarily commit him; again, the same treatment as those similarly situated.

Smith reasons that the reversal of his conviction had the effect of making him "similarly situated to a non-parolee who has prior convictions for sexually violent offenses as defined by the SVP law but who has not been convicted of a new offense that resulted in a determinate sentence and prison custody," therefore requiring that the SVP proceedings be terminated in the name of equal protection, but this comparison is inapt. A non-parolee who has not been convicted of a new offense would not be in custody and therefore would not be subject to SVP proceedings, but when Smith's conviction was reversed, he was in custody and already the subject of a petition for civil commitment as an SVP. Smith has not established that he is being treated differently from other sexual offenders subjected to an SVP petition whose custody was later determined to be unlawful but in good faith. (§ 6601, subd. (a)(2).)

Even if we were to accept Smith's argument that he is similarly situated to a non-parolee who has the requisite prior convictions for the SVP Act but has no present conviction and is therefore not in custody, Smith's equal protection argument would still

fail because of the compelling state interest involved in identifying SVPs before they are released from prison. The court in *People v. Hubbart*, *supra*, 88 Cal.App.4th at page 1231, rejected a similar equal protection argument made by an offender whose custody was unlawful because his parole was improperly revoked. The court wrote, "He asserts that he is similarly situated to persons who otherwise meet the criteria for commitment under the [SVP Act] but who are not in custody pursuant to an unlawful regulation. We disagree. Even assuming that defendant is similarly situated to persons who are not in custody, the difference in treatment is justified under the strict scrutiny standard. The [SVP Act] is narrowly tailored to apply to 'a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders [who] can be identified while they are incarcerated.' [Citation.] There is certainly a compelling state interest in identifying, confining, and treating persons who represent a danger to the health and safety of others in that they are likely to engage in acts of sexual violence. [Citation.] In order to further this compelling state interest, the [SVP Act] makes a necessary distinction between persons already in custody and persons not in custody." (*Ibid.*) Smith has not demonstrated any violation of his Fourteenth Amendment right to equal protection of the laws.

DISPOSITION

The petition for writ of habeas corpus is denied.

CERTIFIED FOR PUBLICATION.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.