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STATEMENT OF THE CASE

Petitioner, LAWRENCE RUDY KIRK, currently resides in Coalinga State Hospital. He was originally committed after being declared a sexually violent predator (SVP) on December 21, 2000. His commitment was extended after a jury trial concluded on September 9, 2003. His commitment was again extended for two years on August 31, 2005.

On December 7, 2006, the prosecution filed another petition to extend Mr. Kirk's commitment. Due to changes in the law, a finding that he is an SVP will result in Mr. Kirk being civilly committed for the rest of his life.

In preparation for the final trial, Mr. Kirk was evaluated by alienists pursuant to the procedures used by the State Department of Mental Health (DMH). On August 15, 2008, the Office of Administrative Law (OAL) determined that the procedures and protocols that were used to find Mr. Kirk an SVP are underground regulations. (2008 OAL Determination No. 19, File # CTU 2008-0129-01; Attached as Exhibit A.) Underground regulations are void and therefore Mr. Kirk may not be lawfully committed as a result of their mandate.

POINTS AND AUTHORITIES
I.
THE SUPERIOR COURT IS THE APPROPRIATE FORUM FOR A HABEAS CORPUS PROCEEDING.

Superior courts have original jurisdiction over writs of habeas corpus. (Cal. Const., Art VI, section 10.) This jurisdiction is vested in the Superior Court and its judges, and is distinct from the limited appellate jurisdiction of the Superior Court. (*In re Ramirez* (2001) 89 Cal.App.4th 1312.) A petition for writ of habeas corpus may be heard by a single superior court judge, but should not be assigned to the trial court judge who made the ruling under review. (*Fuller v. Superior Court* (2004) 125 Cal.App.4th 623.)

1 **II.**
2 **A WRIT OF HABEAS CORPUS IS THE APPROPRIATE REMEDY BECAUSE**
3 **MR. KIRK HAS BEEN UNLAWFULLY DEPRIVED OF HIS LIBERTY.**

4 A writ of habeas corpus will lie when an individual is unlawfully confined or restrained.
5 (Penal Code §1473(a).) A violation of the defendant's rights created by state law amounts to a
6 procedural due process violation if it implicates the defendant's protected interest in life, liberty,
7 or property. (*People v. Talhelm* (2000) 85 Cal.App.4th 400, 408, citing *Clark v. City of Hermosa*
8 *Beach* (1996) 48 Cal. App. 4th 1152, 1178.)

9 Habeas corpus is an action that lies to review a claim of denial of substantive
10 constitutional rights that may have affected the integrity of the fact finding process. (*In re*
11 *Coughlin* (1976) 16 Cal.3d 52, 55; *In re Bell* (1942) 19 Cal.2d 488, 492-495.) When a habeas
12 corpus petition is sufficient on its face (that is, the petition states a prima facie case on a claim
13 that is not procedurally barred), the court is obligated by statute to issue the writ. In the language
14 of the Penal Code, "[a]ny court or judge authorized to grant the writ ... must, if it appears that
15 the writ ought to issue, grant the same without delay" (Pen. Code, § 1476; *People v. Romero*
16 (1994) 8 Cal. 4th 728, 737-738.)

17 Mr. Kirk was civilly committed pursuant to Welfare and Institutions Code sections 6600
18 et seq. which provides a process through which the DMH determined that he is an SVP. His
19 commitment process was initiated by the California Department of Corrections and
20 Rehabilitation (CDCR). He was evaluated by DMH pursuant to procedures and protocols they
21 have developed to determine whether an inmate meets the criteria of an SVP (hereinafter
22 referred to as "the Protocol"). Mr. Kirk was tried in Sonoma County Superior Court and found
23 to be an SVP. His commitment was extended pursuant to further DMH evaluations conducted
24 according to the Protocol. These evaluations led to subsequent trials, and he remains committed
25 to this day.

26 His commitment by the above, state-mandated Protocol has clearly impacted his liberty.
27 If the Protocol is unlawful, then his commitment pursuant to its authority is also unlawful. A
28 writ of habeas corpus is then the appropriate remedy to his unlawful commitment.

1 **A. Mr. Kirk's Commitment is Unlawful Because the Procedures Used to Determine That**
2 **He Is An SVP Are Underground Regulations and Therefore Void.**

3 The Administrative Procedure Act (APA) establishes the procedures by which state
4 agencies may adopt regulations. (Gov. Code, §11340; *Tidewater Marine W. v. Bradshaw* (1996)
5 14 Cal.4th 557.) The APA defines "regulation" very broadly to include "every rule, regulation,
6 order, or standard of general application or the amendment, supplement, or revision of any rule,
7 regulation, order, or standard adopted by any state agency to implement, interpret, or make
8 specific the law enforced or administered by it, or to govern its procedure, except one that relates
9 only to the internal management of the state agency." (Gov. Code, §11342(g); *Tidewater, supra*,
10 at p. 571.) "A regulation subject to the APA thus has two principal identifying characteristics.
11 [Citation] First, the agency must intend its rule to apply generally, rather than in a specific case.
12 The rule need not, however, apply universally; a rule applies generally so long as it declares how
13 a certain class of cases will be decided. [Citation] Second, the rule must 'implement, interpret, or
14 make specific the law enforced or administered by [the agency], or . . . govern [the agency's]
15 procedure.' (Gov. Code, §11342(g).)" (*Tidewater, supra*, 14 Cal.4th 557, 571.)

16 The APA provides that "[n]o state agency shall issue, utilize, enforce, or attempt to
17 enforce any...regulation, unless...[it] has been adopted as a regulation and filed with the
18 Secretary of State pursuant to this chapter." (Gov. Code, §11340.5(a); *Tidewater, supra*, 14
19 Cal.4th 557, 570.) A regulation that does not comply with the rule-making procedures of the
20 APA is considered an underground regulation and is void. (*Capen v. Shewry* (2007) 155
21 Cal.App.4th 378, 383.)

22 Mr. Kirk was civilly committed under the Sexually Violent Predator statute. (Welf. &
23 Inst. Code, §6600 et seq.) This law provides a process by which an inmate of the CDCR can be
24 committed and thereby become a patient of the DMH. If the Secretary of the CDCR determines
25 that an inmate meets the criteria of an SVP, the inmate is referred to the DMH for evaluation.
26 This evaluation is conducted according to a "standardized assessment protocol" (hereinafter
27 referred to as "the Protocol"), developed and updated by the DMH. (Welf. & Inst. Code,
28 §6601(c).) If the DMH determines an inmate is an SVP, they may initiate a petition in the court
where the inmate was convicted to have the inmate civilly committed to a state hospital. (Welf.

1 & Inst. Code, §6601(i).)

2 A judge must then hold a probable cause hearing. (Welf. & Inst. Code, §6602.)

3 Depending on whether the judge finds probable cause that the inmate is an SVP, the inmate is
4 either returned to CDCR for parole or detained for a trial. (Welf. & Inst. Code, §6604.) At trial,
5 either a jury or a judge will decide if the inmate is to be civilly committed as an SVP and held
6 for an indeterminate term. (Welf. & Inst. Code, §6604.) If the inmate is deemed an SVP and
7 becomes a patient in the custody of the DMH, his mental condition will be examined every year
8 to see if he still meets the definition of an SVP. (Welf. & Inst. Code, §6605.) The subsequent
9 evaluations of the inmate/patient are also performed according to the Protocol developed by the
10 DMH. These evaluations become part of a periodic report that gets filed with the court in the
11 form of a declaration. (Welf. & Inst. Code, §6605.)

12 The DMH issued a revised version of the Protocol in 2007. It contains the procedures that
13 independent evaluators are to follow when determining whether an inmate meets the criteria of
14 an SVP. The OAL has determined that several sections of the Protocol are underground
15 regulations.

16
17 **CONCLUSION**

18 Mr. Kirk is in the custody of the DMH and facing civil commitment for life because he
19 was found to be a sexually violent predator. The Protocol used by DMH to evaluate him as such
20 has since been found to be invalid. Therefore, Mr. Kirk's commitment pursuant to this Protocol
21 is unlawful. Mr. Kirk's petition for a writ of habeas corpus should accordingly be granted.

22
23 Dated: September 29, 2008

Respectfully Submitted,
JOHN R. ABRAHAM, PUBLIC DEFENDER

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25
26 By: _____
27 AMY CHAPMAN, Deputy Public Defender
28 Attorney for Petitioner