Filed 8/15/03

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent. DANIEL VASQUEZ, Real Party in Interest.	B166963 (Super. Ct. Nos. ZM003664, BA131290) (Chesley McKay, Judge)

ORIGINAL PROCEEDING. Petition for writ of mandate is granted with directions.

Steve Cooley, District Attorney of Los Angeles County, George Palmer and Roberta Schwartz, Deputy District Attorneys, for Petitioner.

No appearance by Respondent.

Michael P. Judge, Public Defender of Los Angeles County, Albert J. Menaster, Ellen Coleman and Jack T. Weedin, Deputy Public Defenders, for Real Party in Interest.

The People challenge an order dismissing a Welfare and Institutions Code section 6601, subdivision (a) petition to declare real party in interest Daniel Vasquez, a sexually violent predator (SVP).[1] They contend the trial court exceeded its jurisdiction in dismissing the petition. After review, we issue a writ of mandate directing the respondent court to vacate its prior order and to enter a new order with directions.

AN OVERVIEW OF THE STATUTORY SCHEME

Welfare and Institutions Code section 6600 et seq. is known as the Sexually Violent Predators Act (SVPA or the act). The act defines "sexually violent predator" as "a person who has been convicted of a sexually violent offense against two 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)(1).)[2] Pursuant to the SVPA, a prison inmate, who is determined beyond a reasonable doubt to be an SVP, is committed to the custody of the State Department of Mental Health for confinement and treatment for an additional two-year term beyond the end of the person's prison term. (§§ 6601, 6604.) If, at the end of the additional two-year term, the person is determined to still be an SVP, the act provides for successive two-year commitments. (§ 6604.1) Although it is the District Attorney

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[1] All further undesignated statutory references are to the Welfare and Institutions Code.

[2] Section 6600 defines a "sexually violent offense" as a violation of various statutes when committed by force, violence, duress, menace, or after immediate and unlawful bodily injury on the victim or another person. These statutes include Penal Code section 261, subdivision (a)(2) [rape by means of force or fear], and Penal Code section 288a [oral copulation]. (§ 6600, subd. (b).) Conviction for violation of a predecessor statute that includes all of the elements of an offense described by one of the foregoing statutes is also a conviction of a sexually violent offense within the meaning of the SVPA. (§ 6600, subd. (a)(2)(D).)

who brings a petition for commitment as an SVP, proceedings under the act are civil in nature. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1166-1167 (*Hubbart*).)

The SVPA is aimed at "protecting society from, and providing treatment for, that 'small but extremely dangerous group of sexually violent predators' who have diagnosable mental disorders identified while they are incarcerated for designated violent sex crimes, and who are determined to be unsafe and, if released, to represent a danger to others through acts of sexual violence. [Citation.]" (*Garcetti v. Superior Court* (1999) 76 Cal.App.4th 685, 688 (*Garcetti*); see also *Hubbart, supra,* 19 Cal.4th 1153, fn. 20.)

FACTUAL AND PROCEDURAL BACKGROUND

We take our summary of essentially undisputed facts from the moving and opposing papers in this writ proceeding. In November 1977, in case No. A327767, Vasquez was sentenced to three years to life in prison upon entering a plea of guilty to forcible rape in violation of former P10
al Code section 261.2 (the 1977 conviction). He was paroled on July 29, 1980.

In November 1984, in case No. A908805, Vasquez was sentenced to eight years in prison upon his conviction of rape by force or fear in violation of former Penal Code section 261, subdivision (2) (the 1984 conviction).[3] He was paroled on January 25, 1989.

In 1996, Vaquez was charged in case No. BA131290 with rape (Pen. Code, § 261, subd. (a)), oral copulation (Pen. Code, § 288a, subd. (c)) and penetration by a foreign object (Pen. Code, § 289).[4] Trial commenced before the Honorable Chesley McKay in

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[3] The statutes defining rape have been modified and redesignated over the years. These changes do not affect our analysis in this case, as Vasquez's prior convictions have been for violations of statutes including former Penal Code sections 261.2 and 261, subdivision (2), that include the elements of current Penal Code section 261, subdivision (a)(2), which is designated a sexually violent offense by the SVPA. (See § 6600, subd. (a)(1)(D).)

[4] According to Vasquez's motion to dismiss the SVP petition, his total sentencing exposure was 40 years.

September of that year. On September 4, 1996, pursuant to a plea bargain, Vasquez entered a no contest plea to the charge of forcible oral copulation in violation of Penal Code section 288a, subdivision (c) in exchange for a term of six years in prison and dismissal of the remaining charges (the plea bargain).

After Vasquez was advised of his rights and the consequences of his plea, the following colloquy occurred: "THE COURT: . . . The other point I want to make is under – counsel raised an issue under Welfare and Institutions Code section 6600 et seq. [¶] The court is of the opinion that Mr. Vasquez does not fall under the category of 6600 of the Welfare and Institutions Code, and would – and would make that as part of the record. [¶] [DEFENSE COUNSEL]: And that his plea is predicated on that? [¶] THE COURT: Right. [¶] And if, for some reason, somebody tries to stick him into 6600, he would have a right to withdraw his plea and come back to court. [¶] [THE PROSECUTOR]: Okay, that's fine."[5]

Respondent was scheduled to be released from prison in case No. BA131290 in April 2000. On March 17, 2000, the People filed the SVP petition. Vasquez was appointed counsel and denied the allegations of the petition. The matter was continued approximately 38 times over the ensuing years until March 19, 2003.[6] On that date, Vasquez filed a motion to dismiss the SVP petition on the grounds that the terms of the September 1996 plea agreement barred the People from filing the petition and he was entitled to specific performance of the agreement (the motion to dismiss). Vasquez

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[5] It is now well settled that trial courts are not required to advise a defendant, before accepting a guilty plea, that he or she might eventually be subject to additional confinement under the SVPA. This is because such commitment is, "at most a collateral consequence of the plea and admissions" and would not be a "penal" consequence. (*People v. Moore* (1998) 69 Cal.App.4th 626, 628, 631-632; *People v. Ibanez* (1999) 76 Cal.App.4th 537, 546.)

[6] The People maintain that all the continuances were at Vasquez's request. While minute orders indicate that some were at his request, most are silent as to which side sought the continuance.

argued that merely allowing him to withdraw his plea in case No. BA131290 would not restore him to the status he enjoyed before sentencing.

The motion came on for hearing before Judge McKay on May 1, 2003. At the hearing, Vasquez argued that if he had known the People intended to file an SVP petition based on his conviction and incarceration in case No. BA131290, he would not have entered a no contest plea in that case, the prosecution could not have proved the underlying charges, he would not have been in the Department of Corrections' control, and therefore he could not be subject to an SVP petition.[7]

Judge McKay found the prosecutor in case No. BA131290 did not promise to refrain from filing an SVP petition; rather the agreement was that Vasquez could withdraw his plea if an SVP petition was later filed based upon that case. Judge McKay nevertheless observed: ". . . I have a fundamental problem with the District Attorney's position in that it appears to me that even if I just don't dismiss the petition, unequivocally set aside the plea in the case . . . the 288 goes away. . . . [¶] . . . [¶] . . . So, therefore, this whole thing would only rest on his prior two cases. . . . [¶] . . . But basically, I believe . . . it is unconscionable for the court to now say that okay, no harm, no foul, he gets to go forward, he gets his plea set aside and the People can let the petition stand. [¶] . . . [¶] And there has to be some consequence or some value, okay, that attaches to that fact, that he's spent seven years in custody. And now, can we just go and say, well, we've wiped that off the books, it doesn't count for anything and we are going to go forward on this petition? . . . [T]hat's the choice I'm left with, is I set aside the plea, the petition stands and we basically wipe the last seven years off the slate and say, okay, we're back where we started from. [¶] Well, you can't undo that seven years on the defendant's behalf. So there has to be something that happens in regard to that as far as the People are concerned, and the only thing I can think of that makes any sense in

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[7] As previously noted, an SVP petition may only be filed against a person in custody of the Department of Corrections. (§ 6601.)

justice is that the petition should be dismissed. . . ." Whereupon, Judge McKay granted the motion to dismiss, but stayed Vasquez's release to allow the District Attorney to seek review. The People filed their writ petition on May 7, 2003.

We stayed Vasquez's release and on May 29, 2003, issued an order and alternative writ of mandate commanding the trial court to either (a) vacate the May 1 order and enter a new and different order denying the motion to dismiss; or (b) show cause why the trial court had not done so.

On May 30, 2003, Judge McKay vacated the May 1 order and set the matter for a hearing on June 18, 2003, to determine whether Vasquez wished to set aside his plea (the May 30 order). At the hearing on June 18, in response to an oral motion made by Vasquez, Judge McKay vacated the May 30 order "so that moving party may argue its case in the appellate court."

The matter has now been fully briefed.

DISCUSSION

The People contend the trial court exceeded its jurisdiction in dismissing the SVP petition and ordering Vasquez released from custody. They argue that even if Vasquez withdraws his 1996 guilty plea in case No. BA131290, the 1977 and 1984 convictions are sufficient to support an SVP petition without the 1996 conviction. Vasquez counters that he is entitled to specific performance of the prosecutor's promise not to file an SVP petition based on his 1996 conviction. Alternatively, Vasquez argues that even if it is found that the prosecutor made no such promise, equity requires that the SVP petition be dismissed. Vasquez also argues that if he withdraws his plea in case No. BA131290, the SVP petition must be dismissed because, at the time it was filed, he was not in custody lawfully or as a result of a good faith mistake of law or fact, but as a result of a false promise not to file an SVP petition.

We conclude there was no promise in case No. BA131290 to refrain from filing an SVP petition. We agree with the trial court that the only promise that can reasonably be

inferred from the colloquy at the September 4, 1996, hearing is a promise that the People would not object to Vasquez withdrawing his plea in case No. BA131290 if an SVP petition were to be filed while Vasquez was incarcerated on that case.

We conclude further that the trial court exceeded its jurisdiction in dismissing the petition. First, where a plea of guilty or nolo contendere is accepted by the prosecuting attorney in open court and approved by the court, "the court may not proceed as to the plea other than as specified in the plea." (Pen. Code, § 1192.5.) The objective of a plea bargain is to implement the reasonable expectations of the parties. (*People v. Vargas* (1990) 223 Cal.App.3d 1107, 1112.) Here, the reasonable expectation of the parties was that if an SVP petition were to be filed, Vasquez would be given the opportunity to withdraw his plea, not that the petition would be dismissed. In other words, the trial judge in dismissing the petition purportedly *to enforce* the plea bargain instead violated the plea bargain which had expressly limited the remedies available to defendant should the District Attorney file an SVP petition.

Second, as we shall explain, the SVPA itself precludes dismissal of the petition under the circumstances presented here.

In construing the SVPA, we are mindful of the familiar rule of statutory construction that the word "shall," when used in a statute, is ordinarily construed as mandatory or directory, as opposed to permissive. (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1145; *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 551.) In this context, we turn to an examination of the statutory scheme. According to section 6601: "Whenever the Director of Corrections determines that an individual who is in custody under the jurisdiction of the Department of Corrections . . . may be a sexually violent predator, the director *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." (§ 6601, subd. (a)(1), italics added.)

If, after evaluation and screening by the Department of Corrections and the Department of Mental Health, it is determined "that the person is a sexually violent

predator . . . the Director of Mental Health *shall* forward a request for a petition to be filed for commitment under this article" to the appropriate agency—in Los Angeles, the District Attorney. (§ 6601, subd. (h), italics added.) If the District Attorney "concurs with the recommendation, a petition for commitment *shall* be filed in the superior court . . . ." (§ 6601, subd. (i), italics added.) Pursuant to section 6601.5, "a judge of the superior court shall review the petition and determine whether the petition states or contains sufficient facts that, if true, would constitute probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. If the judge determines that the petition, on its face, supports a finding of probable cause, the judge *shall* order that the person be detained" until a probable cause hearing pursuant to section 6602 can be completed. (Italics added.)

At the section 6602 probable cause hearing, "[a] judge of the superior court shall review the petition and *shall* determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. . . ." (§ 6602, subd. (a), italics added.) It is the burden of the District Attorney to establish that "*a reasonable person could entertain a strong suspicion that a person is an SVP*." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 252 (*Cooley*), italics original, citing § 6602, subd. (a); Evid. Code, § 115.) At this hearing, the inmate may challenge the petition on its face, as well as the underlying expert evaluations upon which it is based. (*In re Parker* (1998) 60 Cal.App.4th 1453, 1469-1470.) The trial court may weigh the evidence, resolve conflicts, and give or withhold credence to particular witnesses in determining whether there is probable cause to proceed to trial, but it may not substitute its personal belief for that of a reasonable person evaluating the evidence. (*Cooley, supra*, at pp. 251, 258.)

If, after the section 6602 hearing the judge determines that there is probable cause, "the judge *shall* order that the person remain in custody in a secure facility until a trial is completed and *shall* order that a trial be conducted to determine whether the person is, by

reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release from the jurisdiction of the Department of Corrections or other secure facility." (§ 6602, subd. (a), italics added.)

The repetitive mandate of "shall" has the following consequences: The Director of Corrections must refer for evaluation any inmate that meets the objective criteria of a sexually violent predator. (§ 6601, subd. (a).) If the evaluators determine that the inmate has a diagnosed mental disorder, the Director of Corrections is required to request that the District Attorney file an SVP petition. (§ 6601, subd. (d), (h).) The District Attorney is required to file an SVP petition if the District Attorney "concurs with the recommendation." (§ 6601, subd. (i).)

We understand the phrase "concurs with the recommendation" in section 6601, subdivision (i) to require the District Attorney to determine whether the person fits the objective technical requirements of an SVP, *not* to imbue the District Attorney with discretion to choose whether or not to file an SVP petition to commit a person who meets those requirements. Although the District Attorney generally enjoys broad discretion to commence prosecution for criminal offenses, proceedings under the SVPA are not criminal. (*Cooley, supra*, 29 Cal.4th 235.) By use of the directory term "shall," the Legislature evidenced its intent that an SVP petition be filed against all persons who fit the requirements of an SVP. (Cf. *Board of Supervisors v. Simpson* (1951) 36 Cal.2d 671, 673 [District Attorney is required to file civil suit to abate nuisance where governing statute provided District Attorney "must" bring such action when directed to do so by the board of supervisors]; *Bradley v. Lacy* (1997) 53 Cal.App.4th 883, 887 [where the grand jury has found an accusation of misconduct in office pursuant to Gov. Code, § 3060, District Attorney has no filing discretion to refuse to file and serve that accusation pursuant to Gov. Code, § 3063].) Thus, if the District Attorney determines that the accused is an SVP, the prosecution is required to file the petition. (But see *Gray v.*

Superior Court (2002) 95 Cal.App.4th 322, 329 (*Gray*) [prosecuting attorney may seek to abandon SVP proceeding].)

If the SVP petition, on its face, supports a finding of probable cause, the trial court must order the person detained until a section 6602 probable cause hearing can be completed. (§ 6601.5) Finally, if, after hearing the evidence adduced at the section 6602 probable cause hearing, the trial court determines that there is probable cause to believe the person is likely to engage in sexually violent predatory criminal behavior upon release, the trial court must remand the person to custody until a trial is conducted. (§ 6602.) (See *Gray, supra*, 95 Cal.App.4th at pp.329-330 [disagreement of expert witness on opposing side not grounds for dismissal].)

The SVPA makes no provision for dismissing a petition for any reason other than a failure to establish probable cause to believe the person is an SVP. (§ 6602, subd. (a).) In particular, nothing in the statute supports Vasquez's position that the trial court had discretion to dismiss the SVP petition in order to effectuate its interpretation of a prior plea bargain or for other equitable reasons.[8] Rather, the determination of whether a

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[8] Penal Code section 1385 [dismissal by the court in the interest of justice] would appear to have no application under the SVPA which is a civil proceeding. (*Gray, supra*, 95 Cal.App.4th at p. 330, fn. 15; but cf. *Cooley, supra*, 29 Cal.4th at p. 252 [procedural safeguards of criminal laws may be applied to civil proceedings].) Vasquez has cited no statutory language or other authority that would enable us to infer from the SVPA an intent by the drafters to permit equitable dismissals, and we see no basis to read the SVPA in such a manner. "[T]he Legislature certainly knows how to provide for dismissals when it wishes to do so." (*Gray, supra,* at p. 328.)

We note that in *Garcetti, supra*, 76 Cal.App.4th at page 690, the Court of Appeal reversed a trial court order dismissing an SVP petition. The ruling was based on the trial court's determination that an alleged conviction did not qualify as a predicate sexually violent offense, essentially a legal inquiry that might be made in a traditional civil action by way of a demurrer. The Court of Appeal did not characterize the nature of the purported dismissal which may have been based on a finding of a lack of probable cause, the statutory grounds for a dismissal under section 6602, subdivision (a). The appellate court did not mention Penal Code section 1385.

person is a sexually violent predator can only be made within the framework provided by the SVPA, which understandably does not authorize trial courts to determine, at the time of sentencing, that a criminal defendant will or will not in the future be an SVP. In short, a trial judge may not preemptively bar the Department of Corrections, the District Attorney, or a subsequent trial court from discharging their statutory duties under the SVPA.

Even a jury determination that a person is not an SVP does not resolve the issue for all time: a new SVP petition may be filed upon any subsequent incarceration. (*Turner v. Superior Court* (2003) 105 Cal.App.4th 1046 (*Turner*).) Although addressing a related issue, *Turner* is instructive. In that case, a jury found Turner was an SVP based on 1984 and 1985 convictions for violation of Penal Code section 288a. Toward the end of Turner's two-year commitment, the District Attorney filed a new petition seeking to recommit Turner for another two years based on the same 1984 and 1985 convictions. After a jury found Turner was not an SVP, he was released from custody and placed on parole. Based on a curfew violation, Turner's parole was revoked and he was returned to custody. While Turner was in custody on this parole violation, the District Attorney filed a new SVP petition based on the same 1984 and 1985 convictions. Turner moved to dismiss the petition on the grounds that the jury's finding that he was not an SVP was binding in the subsequent proceeding. (*Id.* at pp. 1051-1052.) The court in *Turner* held

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There are safeguards built into the statutory scheme to prevent nonmeritorious SVP cases from proceeding further than warranted. First, as we have noted, the District Attorney can abandon SVP proceedings after the petition has been filed. (*Gray, supra,* at p. 329.) The trial court may determine either upon review of the petition or after a full hearing that there is no probable cause and may dismiss. (§ 6602, subd. (a).) The accused SVP may move for summary judgment under Code of Civil Procedure section 437c. (See *Gray, supra*, at pp. 324, 330, fn. 15.) Finally, even after commitment, the Department of Mental Health or the SVP may petition the court for conditional release or unconditional release or discharge. (§§ 6605, 6607, 6608. See also *Hubbart, supra*, 19 Cal.4th 1138 pp. 1167, 1177.)

that a prior jury determination that a person was not an SVP does not bar a subsequent petition, supported by changed circumstances, to declare that person a sexually violent predator after a new custodial term.[9] (*Id.* at pp. 1050, 1059.)

Drawing on legislative history, the court in *Turner* observed: " '. . . It is the intent of the Legislature that once identified, these individuals, if found to be likely to commit acts of sexually violent criminal behavior beyond a reasonable doubt, be confined and treated until such time that it can be determined that they no longer present a threat to society.' (Stats.1995, ch. 763, § 1, p. 5921 . . . .) This intention would not be effectuated if the SVPA identification and petition process did not apply to an incarcerated individual merely because a previous petition had been litigated pertaining to an earlier imprisonment. . . . " (*Id.* at p. 1056.) "By identifying an impending release from custody as the statutory trigger for an SVPA evaluation, the Legislature was seeking to ensure that every sexual offender who meets the statutory requirements would be evaluated to prevent likely harm to innocent victims. (See § 6601, subd. (a)(1).)" (*Ibid.*)

Applying the reasoning of the court in *Turner* here, we find the mandatory language of the SVPA evidences a legislative intention to ensure that an SVP petition is brought against every sexual offender who meets the statute's requirements to prevent likely harm to innocent victims. If even a jury finding in favor of an accused SVP does not preclude a redetermination due to changed circumstances, a sexual offender who otherwise meets the statute's requirements cannot be inoculated against application of the SVPA by the terms of a seven-year-old plea bargain.

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9 Finding the psychologists' reports in the SVP proceedings brought following Turner's parole revocation were based primarily on facts that had been before the jury that found Turner was not an SVP, the court in *Turner* held the District Attorney did not present sufficient evidence of changed circumstances to proceed with a second hearing. (*Turner, supra,* 105 Cal.App.4th at pp. 1050-1051.)

Accordingly, we find the trial court here erred when it dismissed the SVP petition. The only remedy to which Vasquez was entitled for the filing of the petition was that for which he bargained, that is, withdrawal of his plea.

Contrary to the trial court's comments, and Vasquez's contention that he would be denied the benefit of his plea bargain if the petition were allowed to stand, we find no inequity in this result, despite the fact that Vasquez has served his bargained for sentence. Implicit in the agreement that Vasquez could withdraw his plea if the state filed an SVP petition, was obviously that such a petition might be filed. Vasquez had to know that the event which would trigger the filing of an SVP petition was the near completion of his prison term, for that timetable is set out clearly in the statute. (See, e.g., § 6601.) Thus, Vasquez was aware that he would only be in a position to withdraw his plea after he had served substantially all of his sentence.

We are also not persuaded by Vasquez's argument that the SVP petition should be dismissed because Vasquez was not in lawful custody at the time the petition was filed. As we understand it, Vasquez's argument is that, if he had not entered a plea, the prosecution would have been unable to prove its case,[10] he would therefore not have been in custody, and the Department of Corrections by statute may not commence SVPA proceedings against someone out of custody. We reject this argument for two reasons. First, that the prosecution would not have been able to prove its case in 1996 is pure speculation. Second, whether or not defendant withdraws his plea, he was in "lawful custody" when the SVP petition was filed in this case on March 17, 2000. That he may be permitted to withdraw his plea does not retroactively make the sentence he has already

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10 This is apparently based on the following comments by Judge McKay at the May 1 hearing: "And if my recollection is correct about why the plea was entered into in the first place was [the prosecutor] told me at the time he wasn't going to be able to prove the case at all and I believe vaguely I think – . . . my recollection is that the victim in this case may have moved to Mexico . . . . I remember something about that there were some real issues there and there was some issue about credibility and some other issues and [the prosecutor] had some real problems with the case."

served unlawful. Indeed, it was the very sentence to which he agreed. Even if the sentence could be characterized as "unlawful," only unlawful custody imposed in bad faith nullifies the custody element of the SVPA—that defendant must have been "in custody under the jurisdiction of the Department of Corrections" at the time the SVP petition is filed. (§ 6601(a)(1); see § 6601(a)(2).)[11] As we have already discussed, Vasquez knew and lawfully agreed that he would be in custody when any SVP petition would be filed; having voluntarily agreed to a plea that included custody time, he cannot now claim his incarceration was unlawful.

We note that if Vasquez withdraws his plea in case No. BA131290, his conviction in that case cannot serve as one of the two sexually violent offenses which are required to establish a person is an SVP.[12] However, the SVP petition here was based on two prior qualifying sexually violent offenses in addition to the conviction in case No. BA131290. If those two prior convictions otherwise satisfy the requirements of section 6600, subdivision (a)(2), the two priors would be sufficient to establish the "convicted of a sexually violent offense against two or more victims" element of section 6600, subdivision (a)(1), even without the conviction in No. BA131290. Whether the petition otherwise establishes the requisite probable cause is a matter for the trial court to decide in the first instance after remand.

DISPOSITION

For the reasons set forth above, let a writ of mandate issue directing the respondent court to vacate its order granting Vasquez's motion to dismiss the SVP

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[11] In pertinent part, section 6601, subdivision (a)(2) provides: "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."

[12] This would not be the case if defendant were to withdraw his plea and subsequently be convicted.

petition and to enter a new and different order denying that motion, and to proceed with the petition according to law. The respondent court is further directed to allow Vasquez the opportunity to withdraw his plea in case No. BA131290 if he so chooses.[13]

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RUBIN, J.

We concur:

COOPER, P.J.

BOLAND, J.

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[13] At oral argument, the People stated they were not certain whether they would seek to retry defendant if he were to withdrew his plea but did acknowledge that, if defendant were retried and convicted, the People would not seek any additional penal custody time for defendant.