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6 IN THE UNITED STATES DISTRICT COURT  
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8 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
9

10 LAWRENCE RUDY KIRK,

No. C 06-0071 CW

11 Petitioner,

ORDER DENYING  
PETITION FOR A WRIT  
OF HABEAS CORPUS

12 v.

13 MELVIN HUNTER,

14 Respondent.  
15 \_\_\_\_\_ /

16 In this pro se petition, Petitioner Lawrence Rudy Kirk  
17 challenges his civil commitment as a sexually violent predator  
18 (SVP) under the Sexually Violent Predator Act (SVPA). Cal. Welf. &  
19 Inst. Code § 6600 et seq.

20 PROCEDURAL HISTORY

21 The SVPA allows the civil commitment of violent criminal  
22 offenders who have committed particular forms of predatory sex acts  
23 against either adults or children, and who are incarcerated.

24 Hubbart v. Superior Court, 19 Cal. 4th 1138, 1154 n.20 (1999).  
25 Commitment as an SVP cannot occur unless it is proven, beyond a  
26 reasonable doubt, that the individual (1) was convicted of a  
27 sexually violent offense against two or more victims; (2) currently  
28 suffers from a clinically diagnosed medical disorder as defined in

1 the SVPA; and (3) is dangerous and likely to continue committing  
2 such crimes if released into the community. Id.

3 In 1998, Petitioner was discharged on parole from a state  
4 sentence for sex offenses. (Resp't Ex. 3, People v. Kirk, No.  
5 A104584, at 2 (Mar. 22, 2005) (Kirk I.)) After five weeks, his  
6 parole was revoked. (Id.) In December, 2000, Petitioner was  
7 committed to the California Department of Mental Health for two  
8 years as an SVP after a jury trial. (Id. at 1.) He was committed  
9 to Atascadero State Hospital (ASH). (Id. at 2.) In December,  
10 2002, the Sonoma County District Attorney filed a petition to  
11 extend Petitioner's commitment. (Id.) A jury found Petitioner to  
12 be an SVP and he was recommitted for two more years.<sup>1</sup> (Id.)  
13 Petitioner filed a direct appeal and the court affirmed the  
14 verdict. (Id.)

15 In October, 2004, another petition to extend Petitioner's  
16 commitment was filed. (Resp't Ex. 5, Motion for Review of Petition  
17 to Extend Commitment as an SVP, at 4.) The superior court judge  
18 found probable cause and scheduled a trial.<sup>2</sup> (Pet'r Ex. A to  
19 Traverse, People v. Kirk, No. A111308, at 1 (Feb. 1, 2007) (Kirk  
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21 <sup>1</sup>At the time of Petitioner's 2002 commitment extension  
22 proceedings, the SVPA commitment was limited to a maximum  
23 term of two years unless the State filed a new petition to  
24 continue the SVP commitment. Cal. Welf. & Inst. Code  
§§ 6604, 6604.1 (2002). In 2006, the statute was amended  
to make the term indeterminate. See Cal. Welf. & Inst. Code  
§§ 6604, 6604.1 (2008).

25 <sup>2</sup>On August 30, 2005, a jury recommitted Petitioner for  
26 two more years. (Id. at 1-2.) Petitioner filed a direct  
27 appeal of these proceedings and the court of appeal reversed  
28 and remanded based on Petitioner's claim of ineffective  
assistance of counsel. (Id. at 1.) Those trial proceedings  
are not challenged here.

1 | I I ) . )

Petitioner filed a petition for a writ of habeas corpus in the superior court challenging the constitutionality of his 2002 trial and his 2004 probable cause hearing. The court denied the petition. (Pet'r Ex. B to Petition, In re Kirk, No. SCR-12659, at 1 (Mar. 4, 2005).) The court of appeal and the state supreme court also denied his habeas corpus petition, both without opinion. (Pet'r Ex. C to Petition, In re Kirk, No. A109597, at 1 (Mar. 30, 2005); Pet'r Ex. D. In re Kirk, No. S133151, at 1 (June 8, 2005)).

## BACKGROUND

On direct appeal from the first extension of his SVP commitment in 2002, the court summarized Petitioner's history as follows:

In 1964, 19-year-old appellant approached 17-year-old Sandra L. at a recreation area, pushed her down, tore her clothing and made unwanted sexual advances toward her. Thereafter, he was sent to the California Youth Authority.

In 1972, 12-year-old Cynthia B. was awakened by someone removing the screen from her bedroom window. Soon after, she saw appellant come out from behind a bush and drive off in his car. A few days before, while Cynthia B. was visiting the home of appellant's minor niece, appellant chased Cynthia B. causing her to be fearful and lock herself inside a room.

In 1978, appellant was the friend of eight-year-old Linda E.'s mother and occasionally visited their home. On one occasion appellant took Linda E. to his house where he removed his pants, got on top of her and penetrated her with his penis. He threatened to kill her, her mother, and her stepfather if she told anyone about the incident. After developing gonorrhea, Linda E. told her mother which led to appellant's arrest and conviction. Following his conviction, appellant was found to be a mentally disordered sex offender and committed to Patton State Hospital. He was released in 1982.

In October 1987, Joan C. and appellant began dating.  
On one occasion when Joan C.'s 13-year-old daughter,

1       Melissa C., stayed home sick from school, appellant came  
2       to the house and forced her to have sex. In July 1988,  
3       Melissa C. told her mother about appellant's molestations  
4       and he was arrested, convicted and sent to state prison

5       In 1996, [Petitioner] was transferred from state prison  
6       to Atascadero State Hospital (ASH). He was discharged on  
7       parole, but after five weeks, his parole was revoked  
8       because he missed his first parole officer appointment  
9       because he was with a woman overnight. He has been at  
10      ASH since his SVP commitment in December 2000.

11      . . .

12      [A]ppellant admitted [in 2002] that he falsely told  
13       the police that Melissa C. was a 13-year-old prostitute  
14       and he gave her \$30 for sex . . . . He claimed that he  
15       and Sandra L. had consensual sex and denied ripping her  
16       clothes. He also denied penetrating eight-year-old Linda  
17       E., but admitted impulsively removing her clothes and  
18       masturbating on her stomach. Whether his act was right  
19       or wrong did not "cross his mind."

20      (Kirk I, at 2.)

21      The court of appeal noted that Petitioner has refused  
22       counseling at ASH because he does not believe he has a mental  
23       disorder. (Id.) The court also noted that Petitioner has  
24       exhibited repeated instances of inappropriate behavior and vulgar  
25       verbal abuse towards female staff at ASH. (Id. at 4; see also  
26       Resp't Ex. 1, vol. 3, Report of Dr. Jay Seastrunk, Jul. 27, 2002,  
27       at 16.)

28      Psychologist Dr. Dawn Starr testified for the prosecution at  
29       the 2002 commitment extension trial. (Kirk I, at 3.) Dr. Starr  
30       interviewed Petitioner in July, 2002 and May, 2003 and reviewed his  
31       ASH records and criminal information packet. (Id.) She opined  
32       that Petitioner met the criteria of an SVP. (Id.) She diagnosed  
33       Petitioner as suffering from "pedophilia, sexually attracted to  
34       females, non-exclusive type, cannabis abuse, alcohol abuse, and a  
35       personality disorder with narcissistic and antisocial features."

1 (Id. at 3-4.) Dr. Starr determined that the pedophilia and  
2 personality disorder rose to the level of statutorily defined SVP  
3 diagnoses. (Resp't Ex. 1, v. 3, Clerk's Transcript, at 46.) Dr.  
4 Starr determined that Petitioner was likely to reoffend based on  
5 his score on the Static 99 scale and his lack of remorse. (Kirk I,  
6 at 4.)

7 Dr. Jay Seastrunk, Petitioner's treating psychiatrist in 2001  
8 and evaluator in 2002, also testified for the prosecution at the  
9 2002 trial. (*Id.*) Dr. Seastrunk also concluded that Petitioner  
10 had exhibited a pattern of inappropriate sexual activity and was in  
11 danger of reoffending. (*Id.*)

Petitioner called Dr. John Podboy, an expert in forensic psychology. (*Id.*) Dr. Podboy testified that, in general, the rate of sexual recidivism decreases with age. (*Id.*) At the time of the hearing, Petitioner was fifty-eight years old. Petitioner also called psychologist Dr. Theodore Donaldson, who had interviewed Petitioner in 2000 and May, 2003 and reviewed the prosecution's psychological reports. (*Id.*) Dr. Donaldson disagreed with Drs. Starr and Seastrunk and opined that Petitioner did not have a diagnosed mental disorder and that because of his age, he presented a low risk of reoffending. (*Id.*)

## LEGAL STANDARD

23        This Court may entertain a petition for a writ of habeas  
24 corpus of an individual in custody pursuant to the judgment of a  
25 state court only on the ground that he is in custody in violation  
26 of the Constitution or laws or treaties of the United States. 28  
27 U.S.C. § 2254(a). The Court may not grant habeas corpus relief  
28 unless the state court's ruling "was contrary to, or involved an

unreasonable application of," clearly established United States Supreme Court law or was based on an unreasonable determination of the facts. 28 U.S.C. §§ 2254(d)(1), 2254(d)(2); Williams v. Taylor, 529 U.S.C. 362, 411-413 (2000).

5 Where, as here, the highest state court to reach the merits  
6 issued a summary opinion which does not explain the rationale of  
7 its decision, federal court review under § 2254(d) is of the last  
8 state court opinion to address the merits. Bains v. Cambra, 204  
9 F.3d 964, 970-71, 973-78 (9th Cir. 2000). In this case, the last  
10 state court opinion to address the merits of Petitioner's habeas  
11 corpus claims is that of the California superior court.

12       A judgment committing an individual under the SVPA is subject  
13 to review under the Antiterrorism and Effective Death Penalty Act  
14 of 1996 (AEDPA) standards set forth in 28 U.S.C. § 2254(d). See  
15 Carty v. Nelson, 426 F.3d 1064, 1072-73, amended, 431 F.3d 1185  
16 (9th Cir. 2005). A California court's interpretation and  
17 application of the SVPA should not be revisited in a federal habeas  
18 action unless the state court's interpretation and application of  
19 the SVPA violates federal due process. See Hubbart v. Knapp, 379  
20 F.3d 773, 779-80 (9th Cir. 2004).

## DISCUSSION

## 22 || T. The Merits of the SVP Determination

23 Petitioner makes three general challenges to the merits of his  
24 SVP determination. The Court will construe Petitioner's argument  
25 as a due process challenge of California's SVPA civil commitment  
26 scheme as applied to him. Federal courts have a duty to construe  
27 pro se petitions for writs of habeas corpus liberally. Zichko v.  
28 Idaho, 247 F.3d 1015, 1020 (9th Cir. 2001). Specifically,

1 Petitioner argues that the SVPA is unconstitutional as applied to  
2 him because he did not commit a "recent overt act" of sexually  
3 violent predation. Petitioner's second argument is that he may not  
4 be found to be presently dangerous under the SVPA after having been  
5 paroled unless his parole had been revoked for reoffending.  
6 Petitioner's third argument is that the trial court did not have  
7 sufficient evidence to commit him civilly.

8 The California Supreme Court has upheld the SVPA as  
9 constitutional against due process, equal protection and ex post  
10 facto challenges. Hubbart v. Superior Court, 19 Cal. 4th at 1152-  
11 1153. The Hubbart court relied on the decision of the United  
12 States Supreme Court in Kansas v. Hendricks, 521 U.S. 346, 370  
13 (1997), which upheld a similar Kansas statute against similar  
14 challenges. The Kansas and California schemes use "nearly  
15 identical" language in defining an SVP as "someone who suffers from  
16 a diagnosed mental disorder which 'predisposes' the person to  
17 committing sexually violent acts and which makes the person a  
18 'menace' to the health and safety of others and 'likely' to  
19 reoffend." The only difference is that the California statute adds  
20 that an SVP is a "'danger' to the public." Hubbart v. Superior  
21 Court, 19 Cal. 4th at 1158 n.24.

22 The plain language of the SVPA supports Respondent's  
23 contention that a recent overt act is not necessary for an SVPA  
24 commitment. Section 6600(d) of the SVPA specifically states that  
25 "danger to the health and safety of others . . . does not require  
26 proof of a recent overt act while the offender is in custody."  
27 Cal. Welf. & Inst. Code § 6600(d); see also People v. Hubbart, 88  
28 Cal. App. 4th 1202, 1221 (2001) ("the SVPA requires proof of a

1 current mental condition and current dangerousness but not a recent  
2 overt act"); In re Calhoun, 121 Cal. App. 4th 1315, 1323 (2004).

3 Petitioner cites the Washington state case of In re Albrecht,  
4 147 Wash. 2d 1, 51 (2002), for his argument that a recent overt act  
5 is necessary for civil commitment under California's SVPA.  
6 However, the AEDPA standard limits this Court to an evaluation of  
7 United States Supreme Court law. Therefore, state law cases are  
8 inapposite, especially one from a different state, interpreting a  
9 different law.

10 Likewise, Petitioner's second argument -- that SVPA  
11 proceedings against him were inappropriate because his parole was  
12 not revoked due to an act of sexually violent predation -- is  
13 without merit. SVPA section 6601(a) specifically authorizes SVPA  
14 proceedings against one whose parole has been revoked. Cal. Welf.  
15 & Inst. Code § 6601(a). It does not require that the parole  
16 revocation was based on a sex offense.

17 Petitioner also claims that the trial court had insufficient  
18 evidence to make an SVP finding. The superior court's rejection of  
19 this contention was not unreasonable. The superior court cited  
20 Hubbart v. Superior Court, which relied on controlling Supreme  
21 Court authority in Hendricks. Hubbart determined that the SVPA  
22 commitment scheme allowing for commitment based on past  
23 convictions, current clinically diagnosed medical disorder and  
24 evaluation of current dangerousness was constitutional. Hubbart v.  
25 Superior Court, 19 Cal. 4th at 1163-1164. The court emphasized  
26 that "the United States Supreme Court has consistently upheld  
27 commitment schemes authorizing the use of prior dangerous behavior  
28 to establish both present mental impairment and the likelihood of

1 future harm." Id.

2 Petitioner specifically attacks the pedophilia diagnoses of  
3 Drs. Starr and Seastrunk, asserting that they were based on his  
4 past sexual misconduct alone and do not prove his current  
5 condition. Petitioner is incorrect. Drs. Starr and Seastrunk  
6 relied on incidents other than his past convictions, including  
7 other sexual misconduct, inappropriate behavior while at ASH --  
8 especially his pattern of abusive comments to female staff, his  
9 Static 99 score, his lack of remorse and his refusal of therapy.

10 In sum, the superior court was not unreasonable in rejecting  
11 Petitioner's claim that due process requires a recent overt act for  
12 an SVPA commitment. Although the state court did not directly  
13 address this issue, Petitioner's claim that an SVPA determination  
14 was inappropriate because he was in custody for a parole violation  
15 that was not a sex offense is without merit. Finally, the state  
16 court was not unreasonable in determining that there was no  
17 deficiency in the SVPA proceedings that would warrant overturning  
18 the jury verdict.

19 II. False Documentary Evidence

20 Petitioner claims that in the probable cause hearing for the  
21 State's 2004 petition to extend his commitment, the prosecution  
22 presented false documentary evidence. Petitioner alleges that the  
23 State listed four California Department of Corrections and  
24 Rehabilitation (CDCR) prisoner numbers as belonging to him and that  
25 the State incorrectly reported that he was currently incarcerated

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<sup>3</sup> in state prison.

Petitioner claims that this violated the truth in evidence rule in the California Constitution, Art. I, § 28(d). However, a federal habeas corpus claim cannot be based on the California Constitution. Petitioner also appears to raise this as a federal due process claim and the Court will construe it as such. In order to obtain habeas relief on the basis of an evidentiary error, Petitioner must show that the error was one of constitutional dimension and that it was not harmless under Brech v. Abrahamson, 507 U.S. 619 (1993). He must show that the error had "'a substantial and injurious effect' on the verdict." Dillard v. Roe, 244 F.3d 758, 767 n.7 (9th Cir. 2001) (quoting Brech, 507 U.S. at 623).

14        Respondent concedes that some of the identification numbers  
15 were inaccurate and that Petitioner was not incarcerated in a  
16 prison at the time of the hearing but was civilly committed at ASH.  
17 However, Respondent points out that the prosecutor corrected the  
18 errors in a declaration filed on the same day, and that the court  
19 did not consider this information in making its determination that  
20 there was probable cause. (Resp't Ex. 5, at 53.)

21 Petitioner fails to explain how the incorrect CDCR numbers or  
22 the incorrect information about where he was incarcerated could  
23 have prejudiced his case in any way, let alone had a "substantial

<sup>3</sup> The prosecution asserted in an October 14, 2004 motion to the state court that Petitioner was "presently an inmate at the California Department of Corrections with the CDC numbers of E-11001, D17643, C98928, J21285 . . ." (Resp't Ex. 5, Motion for Review of Petition to Extend Commitment as an SVP, Ex. 5, at 4.) Only CDCR numbers E-11001 and C98928 belonged to Petitioner while he was incarcerated. (Resp't Ex. 7, Fax from N. Grannis to S. Wooden, Aug. 8, 2006, at 1-5.)

1 and injurious effect" on the outcome. The superior court rejected  
2 this claim in its order denying the petition for a writ of habeas  
3 corpus. (Superior Ct. Habeas Corpus Denial at 1-2.) The superior  
4 court did not unreasonably apply United States Supreme Court  
5 authority, nor did it make an unreasonable determination of the  
6 facts.

7 CONCLUSION

8 The petition for a writ of habeas corpus is DENIED. The clerk  
9 shall enter judgement and close the file. All pending motions are  
10 terminated. Each party shall bear his own costs.

11  
12 IT IS SO ORDERED.

13  
14 Dated: 11/21/08

*Claudia Wilken*

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15 CLAUDIA WILKEN  
16 United States District Judge

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2                   UNITED STATES DISTRICT COURT  
3                   FOR THE  
4                   NORTHERN DISTRICT OF CALIFORNIA

5                   LAWRENCE RUDY KIRK,

6                   Plaintiff,

7                   v.

8                   MELVIN HUNTER et al,

9                   Defendant.  
10                  /

Case Number: CV06-00071 CW

11                  **CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on November 21, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Coalinga, CA 93210

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Dated: November 21, 2008

Richard W. Wieking, Clerk  
By: Sheilah Cahill, Deputy Clerk