SUPREME COURT COPY

S171163

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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SEP 14 2009
CLERK SUPREME COURT

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

JAVIER CASTILLO,

Defendant and Appellant.

S171163

B-202289

Los Angeles County
No. ZM009280

CRC
8.25(b)

APPEAL FROM THE JUDGMENT OF THE

SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLEE STEVEN A. MARCUS, JUDGE

SUPREME COURT
FILED
SEP 14 2009
Frederick K. Ohlrich Clerk
DEPUTY

OPENING BRIEF ON THE MERITS

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San Luis Obispo, CA 93406-1677
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By appointment of the
Court of Appeal under the
California Appellate Project
Independent Case System

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ISSUE ON REVIEW

On May 13, 2009, this court granted review to resolve a single issue: Did the Court of Appeal err by increasing the term of defendant's commitment under the Sexually Violent Predator Act from two years to an indeterminate term pursuant to the 2006 amendments to Welfare and Institutions Code section 6604, when the Los Angeles County District Attorney had stipulated that only the two-year commitment term would be sought?

SUMMARY OF THE PROCEEDINGS AND FACTS[1]

On August 26, 2001, the district attorney of Los Angeles County filed a petition to extend appellant's commitment as a sexually violent predator pursuant to Welfare and Institutions Code section 6600 et seq.[2] On October 27, 2003, the district attorney of Los Angeles County filed another petition to recommit appellant as a sexually violent predator. On September 15, 2005, the district attorney filed yet another petition to recommit appellant as a sexually violent predator. (1CT 1-9.) On January 19, 2006, the trial court granted the district attorney's motion to consolidate all three petitions. (1CT 66.)

On October 31, 2006, the parties filed a stipulation in which they agreed that, due to the uncertainties in the law created by the Senate Bill 1128, which was signed into law on September 20, 2006, as urgency legislation and the similar uncertainties that would be created if Proposition 83, when Jessica's

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[1]On March 12, 2009, Javier Castillo (appellant) filed a petition for review in this court asking this court to address several issues relating to the Court of Appeal's decision to affirm, with a modification, the judgment of the Superior Court of Los Angeles committing him as a sexually violent predator. On May 13, 2006, this court granted appellant's petition for review with respect to one issue only. Because of the limited scope of review, the facts underlying appellant's commitment as a sexually violent predator are completely irrelevant to the issue pending before this court. Therefore, this summary addresses only the procedural history of this case.

[2] The first two petitions seeking appellant's commitment and recommitment as a sexually violent predator were not included in the clerk's transcript but were instead provided as separate documents.

Law, passed in the November 2006 election, the two-year commitment would apply to all petitions pending at the time the new law was enacted and that the district attorney would continue to seek a two-year commitment for 24 months after the effective date of the urgency legislation. (1CT 72-74.)

Appellant's jury trial began on July 31, 2007. (1CT 146.) On August 10, 2007, the jury returned a verdict finding that appellant continued to qualify as a sexually violent predator. In accordance with the stipulation of the parties, the trial court imposed a two year commitment on appellant. (1CT 180-183.)

Appellant filed a timely notice of appeal on September 4, 2007. (1CT 184-185.) The people did not file a notice of appeal or a cross-appeal.

On January 30, 2008, Division Five of the Second District Court of Appeal issued a published opinion upholding the trial court's finding that appellant qualified as a sexually violent predator, but reversing that part of the judgment that imposed a two year commitment and replacing it with an indeterminate commitment.[3] Appellant filed a petition for rehearing which the Court of Appeal denied. Thereafter, appellant filed a petition for review with this court.

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[3] Although, obviously, this opinion is no longer published, appellant will cite to and quote from the opinion using its originally published pages cites of 170 Cal.App.4th 1156.

ARGUMENT

I. THE COURT OF APPEAL SHOULD NOT HAVE REACHED THE MERITS OF RESPONDENT'S CLAIM BECAUSE RESPONDENT FAILED TO FILE A CROSS-APPEAL.

Appellant filed a notice of appeal challenging the trial court's determination that he qualified as a sexually violent predator and its order committing him for two years as a result of that determination. Respondent could have filed a cross-appeal challenging the two year commitment but did not do so. Respondent's failure to do so meant that the Court of Appeal was prohibited from addressing respondent's claims.

The rule requiring respondent to file a cross-appeal is well established:

> As a general matter, "a respondent who has not appealed from the judgment may not urge error on appeal." (California State Employees' Assn. v. State Personnel Bd. (1986) 178 Cal.App.3d. 372, 382, fn 7 [223 Cal.Rptr. 826].) Code of Civil Procedures section 906 provides a limited exception "to allow a respondent to assert a legal theory which may result in affirmance of the judgment." (178 Cal.App.3d. at p. 382, fn.7.) However, in this instance Ronald seeks *reversal* of the judgment and entry of a new judgment more favorable to him. Having failed to appeal, Ronald cannot seek such affirmative relief.

(Estate of Powell (2000) 83 Cal.App.4th 1434, 1439.)

A similar, but somewhat more detailed explanation of this rule can be found in California State Employees' Assn. v. State Personnel Bd. (1986) 178 Cal.App.3d. 372, 382, footnote 7:

> Defendant and respondent Universal did not appeal from the judgment. Nonetheless, as a respondent, Universal has filed a brief in this court

urging us to reverse the judgment on various grounds. However, "Although it is the appellant's task to show error, there is a corresponding obligation on the part of the respondent to aid the appellate court in sustaining the judgment." (9 Witkin, Cal.Procedure (3d ed. 1985) § 492, p. 481.) Thus, it is the general rule that a respondent who has not appealed from the judgment may not urge error on appeal. (See, e.g., Puritan Leasing Co. v. August (1976) 16 Cal.3d 451,463, 128 Cal.Rptr. 175; Henigson v. Bank of America (1948) 32 Cal.2d 240, 244; Ray v. Parker (1940) 15 Cal.2d 275, 282; California C.P. Growers v. Williams (1938) 11 Cal.2d 233, 238.) A limited exception to this rule is provided by Code of Civil Procedures section 906, which provides in pertinent part: "The respondent ... may, without appealing from the judgment, request the reviewing court to and it may review any of the foregoing [described orders or rulings] for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken." (Emphasis added.) The purpose of the statutory exception is to allow a respondent to assert a legal theory which may result in affirmance of the judgment. (See Central Manufacturing District, Inc. v. Board of Supervisors (1960) 176 Cal.App.2d 850, 857, 1 Cal.Rptr. 733; 9 Witkin, op.cit. supra, § 249, pp.255-256.) Here, without appealing, respondent seeks not to save the judgment but to overthrow it. This cannot be done; we will not review Universal's contentions of error. (Code Civ.Proc., § 906; Henigson v. Bank of America, supra, 321 Cal.2d at p. 244.)

California Code of Civil Procedures section 906 is very clear on this point. The respondent can request a reviewing court to, without filing a notice of appeal, consider errors "for the purpose of determining whether or not the appellant was prejudiced by the errors or errors upon which he relies for reversal or modification of the judgment for which the appeal is taken." However, section 906 does not authorize the appellate court "to review any decision or order from which an appeal might have been taken." Thus, under

section 906, the Court of Appeal was not authorized to review the trial court's order committing appellant for two years because that was an order from which respondent could have appealed. Although the two cases quoted by appellant are both intermediate appellant court cases and, therefore, not binding on this court, the holdings of those courts are consistent with precedent of this court, especially those cases cited in California State Employees' Assn.

Thus, for example in California Canning Peach Growers v. Williams (1938) 11 Cal.2d 233, 238, the respondent attempted to claim that the trial court erred in finding that the appellant had entered into a partnership. This court ruled that the "[r]espondents, of course, on appellant's appeal, cannot question the correctness of this finding." Similarly, in Henigson v. Bank of America Nation Trust and Savings Association (1948) 32 Cal.2d 240, 244, this court stated that "[i]t is well settled that parties who have not appealed cannot attack the findings, the only objections there to which can be received being those urged by appellant."

In Puritan Leasing Company v. August (1976) 16 Cal.3d 451,463, the respondent attempted to raise an issue that had been decided against him by directed verdict without filing a cross-appeal. This Court noted that the respondent could have delayed its decision as to whether to file the cross-appeal until after it learned "whether plaintiff, in reality the losing party in the

trial court, would file a direct appeal. Not having filed such a cross-appeal, they may not raise this issue on retrial."

For some reason, the Court of Appeal elected to completely ignore this long standing rule of law and, instead, rejected appellant's claim that a cross-appeal was required by describing UAP-Columbus JV 326132 v. Nesbitt (1991) 234 Cal.App.3d 1028, 1034, as merely expressing "the general rule that there can be no appellate jurisdiction over a 'case or controversy' in the absence of a timely appeal. (Ibid.) Here, Castillo's timely appeal of the commitment order provided this court with subject matter jurisdiction over the legitimacy of the trial court's commitment order." (Castillo, supra, 170 Cal.App.4th at 1181.) This analysis was defective insofar as it failed to address appellant's claim.

Appellant does not dispute that his notice of appeal granted the Court of Appeal subject matter jurisdiction over his case. However, subject matter jurisdiction alone does not grant the Court of Appeal the authority to address an issue that could only be raised if the respondent filed a cross-appeal. In effect, the Court of Appeal's ruling in this case rewrites well-established California law and voids the last sentence of Code of Civil Procedure section 906.[4]

[4] As the cases cited by appellant reveal, the clearest statement of the California law on the cross-appeal requirement is in published cases from Courts of Appeal, not this court. Even if this court does nothing more than

II. BECAUSE THE STATE AGREED TO THE STIPULATION, IT WAS BARRED FROM CHALLENGING THE TWO-YEAR COMMITMENT ON APPEAL.

In the trial court appellant, the People of the State of California, and the trial court reached an agreement that, notwithstanding any changes in the law, appellant, if he were found to qualify as a sexually violent predator, would receive a two year commitment. At no time did the people object to this agreement in the trial court.[5] As a result, the People were barred from challenging the validity of the two-year commitment. Whether this bar is characterized as one of forfeiture, waiver, estoppel, contractual obligation, or due process, the People cannot challenge the two year commitment on appeal. By agreeing to this stipulation, the people induced appellant, the trial court, and the various other prospective SVPs in appellant's position, to change their

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restate the holding from California State Employees' Assn. that would be useful because it would no longer be possible for an appellate court to ignore the requirement of a cross-appeal. Appellant recognizes that by granting review, this Court very likely demonstrated its interest in reaching the merits of the substantive issue so as to provide the Los Angeles County Superior Court with guidance as to how to proceed in future cases. Obviously, deciding this case solely based upon the absence of cross-appeal would not provide such guidance. Nevertheless, appellant believes that this Court should reach both issues. Further, even if this Court rules against appellant on the primary issue, it should rule his favor on this issue and, thereby instruct the lower courts that while a two year commitment may not be appropriate in future cases, it cannot be disturbed on appeal unless the state files a timely cross-appeal.

[5] In fact, as the joint letter from the Los Angeles County Public Defender and the Los Angeles County District Attorney filed with this court in support of appellant's petition for review demonstrates, the district attorney

behavior based upon a promise that they would only be subject to a two year commitment. Further, the people were well aware of this issue and consciously chose to agree to the stipulation. By ruling against appellant, the Court of Appeal, in essence, gave the People of the State of California the power to freely lie and cheat.

A. WAIVER AND FORFEITURE.

Because the People failed to raise this issue in the trial court they both waived and forfeited their right to raise the issue on appeal. Although some cases have confused the distinction between waiver and forfeiture both doctrines apply in this case. As this court stated in In re S. B. (2004) 32 Cal.4th 1287, 1293, footnote 2:

> Although the loss of the right to challenge a ruling on appeal because of a failure to object in the trial court is often referred to as a 'waiver,' the correct legal term for the loss of a right based on failure to timely assert it is 'forfeiture' because a person who fails to preserve a claim forfeits that claim. In contrast, a waiver is the "'intentional relinquishment or abandonment of a known right.'"

Here, the People forfeited the claim because they failed to raise it in the trial court. They also waived the claim because the stipulation reflects an intentional abandonment of a claim of which they were, obviously, well aware.

The Court of Appeal never directly addressed the waiver or forfeiture argument and, instead, jumped right past the issue by analogizing appellant's

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still wishes to abide by this agreement.

civil commitment to a sentence in a criminal case stating "we note that were this matter of criminal sentencing, there would be no serious question." (Castillo, supra, 170 Cal.App.4th at 1181.) This statement is true, but not exactly in the way the Court of Appeal meant. If this were a criminal case with an unauthorized sentence, the issue certainly could be raised on appeal. However, when the unauthorized sentence was part of a plea agreement, the plea agreement is not simply ignored. Instead, the appellate remedy is to reverse and remand the matter to the trial court to give the defendant the opportunity to withdraw from his plea agreement. In this case, the stipulation is the functional equivalent of a plea agreement and the appropriate remedy, if the stipulation cannot be enforced, is to remand the matter to the trial court to give appellant the opportunity to withdraw from the stipulation and go to trial to face an indeterminate commitment as if no stipulation had ever been made.

Thus, in People v. Brown (2007) 147 Cal.App.4th 1213, the parties made a plea agreement which called for the defendant not to pay restitution. Notwithstanding the agreement, the trial court imposed restitution. On appeal, the court determined that the imposition of restitution violated the plea agreement, but that restitution was mandatory and not an appropriate subject of plea bargaining. The court reversed the judgment and remanded the case to the trial court holding that because the plea agreement could not be specifically

performed, the defendant must be given the opportunity to withdraw her plea.

If, as the Court of Appeal determined, the two year commitment was the equivalent of an unauthorized criminal sentence, then appellant is entitled to a similar remedy. By failing to grant appellant this remedy, the Court of Appeal failed to comply with the very precedent it claimed to be following when it chose to analogize appellant's two-year commitment to an unauthorized criminal sentence.

In any case, the Court of Appeal cited no prior precedent or authority suggesting that a civil commitment and a criminal sentence should be treated similarly. Instead, the Court of Appeal simply assumed its conclusion. The Court of Appeal could just as easily have assumed that they must be treated differently and, therefore, the State had waived and forfeited the issue.

In jumping to the conclusion that the two types of cases should be treated similarly, the Court of Appeal relied on a substantially irrelevant case, People v. Renfro (2004) 125 Cal.App.4th 223. In Renfro, the court decided that a plea agreement prohibiting the state from using the defendant's criminal conviction as the basis of a subsequent mentally disordered offender commitment was not enforceable. Thus, in Renfro the dispute did not revolve around the enforceability of an agreement in a civil case but on the enforceability on the illegal plea agreement in a criminal case. Renfro is not

authority for the proposition that a flawed stipulation in a civil case should be treated the same way as an illegal plea agreement in a criminal case.

Moreover, in Renfro, the attempt to enforce the plea agreement was not made in the original criminal case but in a completely different mentally disordered offender case filed in a different county. Here, of course, appellant is attempting to enforce the stipulation in the very same case.

In addition, the Renfro court recognized that the defendant in that case was entitled to a remedy for the violation of the plea agreement, but simply ruled that the remedy must be sought back in the criminal court in which Mr. Renfro was originally convicted. Presumably, Mr. Renfro would be permitted to withdraw his guilty plea so that the parties back would be restored, as nearly as possible, to their original position, meaning that Mr.Renfro would get a trial or be able to enter into a different, but legally enforceable plea agreement.

By analogy, appellant should also be granted a remedy whereby his case is remanded to the trial court and he is given the option to withdraw from the stipulation. Thereafter, appellant's case could proceed to a new trial at which appellant would be subject to the imposition of an indeterminate commitment.

By failing to directly address and consider the waiver and forfeiture issues, the Court of Appeal also chose to ignore the uncertain status of the law at the time the parties entered into a stipulation. At that time, People v. Shields

(2007) 155 Cal.App.4th 559, Bourquez v. Superior Court (2007) 156 Cal.App.4th 1275, and People v. Carroll (2007) 158 Cal.App.4th 503 had not yet been decided. It was entirely possible that the courts would have interpreted the new laws to require two-year commitments for any person whose prior commitment had expired prior to the effective date of the indeterminate commitment law. It was, at least theoretically, possible that the courts would hold that any person originally committed under the two-year commitment provision would be subject to that two-year commitments indefinitely and only new commitments would be subject to an indeterminate commitment. Possibly, the courts might even have enforced the literal terms of the statue which included no provision for recommitment and required the release of all persons previously committed as sexually violent predator. Unlikely as such ruling might have been, the stipulation avoided this risk and gave the appellate courts time to address the issues without causing significant problems in Los Angeles County. Under such circumstances, the district attorney's decision to enter into an agreement to avoid these numerous problems, including a sudden influx of cases when all the SVP defendants simultaneously withdrew time waivers, must be viewed as a valid waiver.

B. ESTOPPEL.

The Court of Appeal rejected appellant's claim that the attorney general

is estopped from taking a position contrary to that asserted by the district attorney in the trial court. In rejecting that argument, the Court of Appeal ignored the evidence provided by Amicus Curiae and found that appellant had not detrimentally relied on the stipulation. The Court of Appeal also restricted its estoppel analysis to equitable estoppel even though, arguably, both judicial and promissory estoppel also applied. Even if this court determines that respondent was not required to file a cross-appeal to raise this issue and that its failure to raise the issue in the trial court did not waive or forfeit the issue, it should still find that the People are estopped from challenging appellant's two year commitment.

1. Judicial Estoppel.

The Court of Appeal should have applied judicial estoppel to preclude the People from taking a different position in the Court of Appeal from the position they took in the trial court. Similarly, this Court should apply judicial estoppel to preclude the People from taking a different position in this court than they did in the trial court.

As this court stated in MW Erectors Inc. v. Niederauser Ornamentals and Metal Works Company Inc. (2005) 36 Cal.4th 412, 422:

> " ' "Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] . . . " ' [Citation.] The doctrine [most appropriately] applies when: '(1) the same party has taken two

> positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' "

Although the application of judicial estoppel is discretionary with the court, the doctrine is designed "to maintain the integrity of the judicial system and to protect parties from opponent's unfair strategies." (MW Erectors, supra, 36 Cal.4th at 422.) Appellant submits that this is a perfect case for this court to maintain the integrity of the judicial system by protecting appellant from the unfair strategy adopted by the attorney general.

Each of the five elements of judicial estoppel is met. The People have taken (1) two different positions, (2) in judicial proceedings which were (4) totally inconsistent. The People did not agree to the stipulation (5) as a result of ignorance, fraud, or mistake and, because the trial court imposed a two-year commitment, the People were (3) successful in asserting their first position in the trial court.

In its analysis of equitable estoppel, the Court of Appeal found, erroneously, that appellant had not detrimentally relied on the stipulation. Detrimental reliance is not required for judicial estoppel. Instead, the doctrine is designed to protect the integrity of the legal system as a whole—a consideration which the Court of Appeal neglected. Thus, even if the Court of

Appeal's analysis of detriment was accurate, that analysis is irrelevant to the application of judicial estoppel.

2. Promissory and Equitable Estoppel.

The stipulation should also be enforced based upon the doctrine of promissory and equitable estoppel. Under the facts of this case, there is not much practical difference between the two doctrines. Whether the stipulation is viewed as a promise by the district attorney and the trial court that appellant would only receive a two year commitment or as a factual assertion that he would only receive a two year commitment, the effect is the same.

Under the doctrine of promissory estoppel "[a] promise which the promisor should reasonably expect to induce actual forbearance on the part of the promisee or third person and which does induce such actional forbearance is binding if injustice can be avoided only by enforcement of the promise." (Kajima / Ray Wilson v. Los Angeles County Metropolitan Transportation Authority (2000) 23 Cal.4th 305, 310.)

The elements of equitable estoppel are:

> (1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend his or her conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely upon the conduct to his or her injury."

(Cotta v. City and County of San Francisco (2007) 157 Cal.App.4th 1550,

1567.)

Clearly, both doctrines apply to this case. In fact, the Court of Appeal's opinion admits as much with respect to all of the elements except detrimental reliance. In rejecting the equitable estoppel claim on these grounds, the Court of Appeal stated that appellant failed "to show any detrimental reliance on the stipulation to seek only a two-year commitment. We find unconvincing Castillo's assertion that his incentive to defend himself was diminished by the understanding that, due to numerous trial continuances, he was effectively facing only a 2-month commitment at the time of trial." (Castillo, supra, 170 Cal.App.4th at 1184.) The Court of Appeal stated that appellant knew that a verdict in his favor would result in his release and had no reason to believe that a verdict in the People's favor would result in his release after only two more months. In so reasoning, the Court of Appeal missed the point of appellant's claim. Appellant was not claiming that his detrimental reliance was due to the fact that he expected to be released in two months. Instead, appellant's claim is that he expected to get another trial and, therefore, the results of the current trial, which would only lead to two additional months of commitment, were less significant than the results of the next trial, which would have been the trial in which he faced a lifetime commitment.

More importantly, however, the Court of Appeal completely ignored the

information provided by amicus curiae in its brief. In that brief and the exhibits attached to the brief, the Los Angeles County Public Defender, appellant's trial attorney, demonstrated quite clearly that appellant's detrimental reliance far exceeded that which the Court of Appeal acknowledged. As the letter from the Los Angeles County District Attorney to the Attorney General of the State of California demonstrated, the stipulation did not suddenly appear out of whole cloth in October, 2006. Instead, the process of negotiating the stipulation began earlier in the year when, as the District Attorney put it, "[b]y the middle of 2006, it was clear that SB 1122 and/or Proposition 83 (Jessica's Law) slated for the November 7, 2006 ballot, would pass, amending Welfare and Institutions Code section 6604, thereby extending the commitment term for sexually violent predators from 2-years to an indeterminate term." (Exhibit C attached to Amicus Curiae Brief in the Court of Appeal in Support of Appellant.) Further, as the District Attorney noted, the imminence of these changes in the law presented the significant risk that the Los Angeles County Public Defender's would demand prompt trials for all 136 pending sexually violent predator petitions in the months immediately proceeding the change of law. The Los Angeles County Superior Court could not have handled this sudden increase in its workload. As a result, some prospective sexually violent predators would have gotten trials and received

two-year commitments. Others might have had their trials continued, perhaps for good cause, into the time period where the indeterminate commitment became available. Still others might have had the petitions dismissed based upon the State's inability to prosecute them in a reasonably timely fashion (See People v. Litmon (2008) 162 Cal.App.4th 383.)

It is, of course, impossible to determine which category would have included appellant. Certainly, because appellant, by that time, had three pending petitions, he probably would have had some priority over prospective sexually violent predators that were facing their first petition. Nevertheless, in reliance on the ongoing negotiations and the advice of his attorney, appellant did not push for an immediate trial. Given the ultimate rulings of the appellate court's finding that the change to an indeterminate commitment applied to petitions filed before the change of the law, this clearly constituted detrimental reliance on appellant's behalf.

For some reason, the Court of Appeal elected not to consider the full extent of appellant's detrimental reliance as described in the amicus brief. By failing to consider this information, the Court of Appeal, no doubt, found it easier to reject appellant's estoppel claim but, in making its decision easier, the Court of Appeal also made the wrong decision.

The Court of Appeal further decided that enforcing the parties'

agreement would be inappropriate because "even in cases—unlike Castillo's—where the prosecution has broken its promise, specific performance is neither a favored remedy nor required by the federal constitution." (Castillo, supra, 170 Cal.App.4th at 1184.) The Court of Appeal's reasoning here is bizarre. This is indisputably a case where both the prosecution and the court system broke a promise to appellant. They promised appellant a two-year commitment. Appellant has now received an indeterminate commitment. The fact that the promise was broken by the attorney general, not the district attorney, and the Court of Appeal, not the Los Angeles County Superior Court, is of no consolation to appellant and is, in any case, irrelevant.

In addition, the Court of Appeal cited no applicable authority for its proposition that specific performance is not a favored remedy when the prosecution has broken its promise. There are certainly times when specific performance is not the favored remedy, but there are also times when it is the favored remedy. Likewise, the court's claim that specific performance is not required by the federal constitution is simply an over-general, unsupported assertion. Certainly, there are times when the federal constitution would not require a specific performance, but there are undoubtedly times when it is required.

In this case, the Court of Appeal believed that enforcing the State's

promise "would be especially inappropriate when the 'plea agreement' went beyond the sentencing[6] court's authority' such that it would undermine the applicable legislative scheme 'and, in so doing, undermine public policy, public safety, and the administration of justice by our courts.'" (Castillo, supra, 170 Cal.App.4th at 1184, quoting Renfro, supra, 125 Cal.App.4th at 233. Footnote added by appellant.)

This claim has a superficial appeal, but it is simply not true. In Renfro, the district attorney in San Bernardino made a plea agreement with the defendant in his criminal case promising that the conviction would not be used as the basis for a mentally disordered offender commitment. In a subsequent mentally disordered offender proceeding arising in San Luis Obispo County, the Court of Appeal found that the criminal plea agreement was not enforceable. Assuming that this decision was correct, that does not mean that the Court of Appeal reached the right conclusion in this case. Appellant is attempting to enforce an agreement between the parties and the court made in the very same civil, not criminal, case. Further, the Renfro court did not refuse to provide Mr. Renfro with any remedy; it simply stated that the remedy must be back in San Bernardino County in his criminal case. In contrast, by not remanding the case to the trial court to give appellant the opportunity to

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[6] Of course, since, this was a sexually violent predator case, there was

withdraw from the stipulation, the Court of Appeal here offered appellant no remedy whatsoever.

Further, the Court of Appeal's claim that the agreement between the parties would undermine the legislative scheme, public policy, public safety, and the administration of justice was simply false. Certainly, giving the People of the State of California the authority to make and break promises at will cannot be viewed as good for the "administration of justice by our courts." Here, enforcing an agreement by the district attorney, made with the specific intent to avoid the risk of a massive release of alleged sexually violent predators hardly conflicts with the public safety about which the Court of Appeal was so concerned. In fact, both the administration of justice and public safety would be better served by the enforcement of the stipulation. After all, the stipulation was designed to ensure that the hundred plus sexually violent predator petitions pending in Los Angeles County Supreme Court would be heard on their merits rather than rushed into an overburdened court system leading to, potentially, the release of a significant number of the prospective sexually violent predators.

The stipulation avoided that problem by agreeing that appellant would not face an indeterminate commitment in his next trial. The stipulation did not

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no sentencing court.

call for appellant's immediate release. Instead, the stipulation simply called for appellant to receive another trial after which he would be released only if the State could not prove, beyond a reasonable doubt, that he was a sexually violent predator.

In 2006, appellant's sexually violent predator proceedings had been pending so long that there were three unresolved petitions. Appellant had every right to insist upon a prompt and immediate trial. He chose not to do so because he was promised by his attorney, the trial court, and the district attorney, that he would not suffer any adverse consequences from delay even when the law changed to require an indeterminate commitment. By agreeing to this deal, appellant detrimentally relied on these promises and assertions of fact. Under such circumstances the State of California and the California court system is estopped from imposing an indeterminate commitment on appellant in this proceeding.

C. DUE PROCESS.

The Court of Appeal's holding also violates appellant's due process rights under both the state and the federal constitution. This position is consistent with the circumstances in this case would be fairly clearly covered by the holding of the United States Supreme Court in Santobello v. New York (1971) 404 U.S. 57. In Santobello, the Supreme Court concluded that when the

state makes a deal with a defendant, it is required to comply with its agreement. In Santobello, the defendant plead guilty in exchange for the withdrawal of certain charges and an agreement by the prosecutor not to make a sentencing recommendation. By the time appellant's case came up for sentencing, a different prosecutor was assigned to the case and, being unaware of the agreement, recommended that the defendant receive the maximum sentence available for appellant's offense. The Supreme Court determined that this was a violation of the defendant's due process rights and remanded the matter to the State to determine the appropriate remedy. The State would either specifically enforce the agreement or allow the defendant to withdraw from the plea bargain.

Appellant's situation, although not a criminal case, is similar. Appellant made a deal with the State of California. Notwithstanding the fact that the State of California is represented by a different office on appeal than at the trial court, the deal is still enforceable. The State's failure to comply with the agreement is a significant due process violation. Santobello did not dictate the remedy for the due process violation and, instead, left that to the state courts. Similarly, appellant does not contend that the due process violation inherent in the Court of Appeal's decision not to impose the two-year commitment mandates any specific remedy. However, it does mandate a remedy.

Therefore, the Court of Appeal instead of simply imposing an indeterminate commitment on appellant should have ordered the State to specifically perform its agreement or, if that option was not available under the law, remand the matter to the Superior Court where appellant would be permitted to withdraw from the agreement.

III. AT THE TIME OF APPELLANT'S TRIAL, THE COURT LACKED THE JURISDICTION TO CONDUCT RECOMMITMENT PROCEEDINGS OR TO IMPOSE AN INDETERMINATE, RATHER THAN A TWO YEAR, COMMITMENT.

Underlying the Court of Appeal's ruling increasing appellant's commitment from two years to an indeterminate commitment was the belief that appellant was, in fact, legally subject to an indeterminate commitment at the time of his trial. Appellant does not agree.

Appellant recognizes that three published cases disagree with his position: Bourquez v. Superior Court (2007) 156 Cal.App.4th 1275, People v. Shields (2007) 155 Cal.App.4th 559, and People v. Carroll (2007) 158 Cal.App.4th 503. However, none of these cases are binding on this court. Therefore, this court needs to address this issue before it can uphold the Court of Appeal's decision should it disagree with appellant's claims, Arguments I and II above.

At the time appellant's prior two-year commitment expired,[7] the law permitted only a two year commitment, not an indeterminate commitment. However, by the time appellant went to trial, Proposition 83 had passed and, under the current version of the law, appellant was allegedly subject to an indeterminate commitment. Appellant contends that by applying the current law to his case and imposing an indeterminate term, the trial court erred. Because the law did not contain provisions permitting the recommitment of a previously committed SVP, appellant should have been released. In the alternative, the trial court should have imposed only the two year commitment permitted under the old version of the law.

Appellant believes that the courts in Bourquez, Shields, and Carroll erred by, in effect, completely rewriting the law. Even if the current law was not intended to require the release of previously committed sexually violent predators, the appropriate remedy would be to leave the old version of the law in effect rather than applying to new law to persons already committed.

A. RETROACTIVITY ANALYSIS.

Under well established law, statutes are deemed to apply prospectively unless the Legislature has unequivocally manifested an intention of retroactive application. (United States v. Security Industrial Bank (1982) 459 U.S. 70, 79-

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[7] Actually, it was the prior requested but not yet imposed commitment

90; Evangelatos v. Superior Court (1988) 44 Cal.3d 1188, 1206-1207.) There was no unequivocal statement of legislative intent that the provisions of the current law apply retroactively, and any such application would run afoul of the due process clauses of both the state and federal constitutions. ''[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to confirm their conduct accordingly; settled expectations should not be lightly disrupted." (Landgraf v. USI Film Products (1994) 511 U.S. 244, 265.) This court further noted that

> the antiretroactivity principle finds expression in several provisions of our Constitution. The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation. Article I, § 10, cl. 1, prohibits States from passing another type of retroactive legislation, laws "impairing the Obligation of Contracts." The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation." The prohibitions on "Bills of Attainder" in Art. I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. (See, e.g., United States v. Brown, 381 U.S. 437, 456-462 (1965).) The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application. (Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976).)

(Landgraf, supra, 511 U.S. at 266.)

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on the second of the tree consolidated petitions.

These principles apply to this case. At the time appellant's prior commitment expired, the old version of the sexually violent predator law was in effect. In accordance with that law, the prosecution filed a petition to extend appellant's commitment for two years. That was the only legal commitment that could be imposed upon appellant at that time. Although appellant's trial was delayed past the expiration of his prior commitment, nevertheless, the trial itself was intended to determine the legality of the commitment that would have begun at that time and lasted two years and two years only. Nothing in the language of Proposition 83 suggested that it was intended to or could change the length of a commitment that had already begun to run, even if it had not been formally imposed by a court. Moreover, if Proposition 83 was intended to apply retroactively then it created a jurisdictional problem because the language of the Proposition contained no provision for the recommitment of people like appellant, previously found to qualify as sexually violent predators.

B. JURISDICTIONAL ANALYSIS.

Prior to September 2006, Welfare and Institution Code section 6604.1 and 6604, contained the provisions limiting a commitment as a sexually violent predator to two years and authorizing recommitment. The urgency legislation enacted by the legislature in September 2006 amended those provisions as did Proposition 83 and, replaced the two year commitment with an indeterminate

commitment and eliminated any reference to a recommitment process.

The language of the current law is clear and unambiguous. Its language therefore controls application of the statute and there is nothing to "interpret" or "construe."(Halbert's Lumber, Inc. v. Lucky Stores, Inc. (1992) 6 Cal.App.4th 1233, 1238-1239.) It is presumed the Legislature intended everything in a statutory scheme, and courts should not read statutes to omit expressed language or include omitted language. As this Court stated, "we are aware of no authority that supports the notion of legislation by accident." (In re Christian S. (1994) 7 Cal.4th 768, 776.)

The current law limits commitments under Welfare and Institution Code section 6601, subdivision (a) (2) to persons "in custody [of the Department of Corrections and Rehabilitation] pursuant to [a] determinate prison term, parole revocation term, or a hold placed pursuant to Section 6601.3, at the time the petition is filed." Of course, because appellant had been previously committed to the Department of Mental Health, he was not such a person.

Even if it could be clearly shown that the omission of language authorizing appellant's recommitment was a legislative oversight that should not change the result. At the time the trial court committed appellant to an indeterminate term, the trial court lacked the authority to do so either because the current law was in effect and provided no authority to recommit appellant

because he was not in the custody of the Department of Corrections as required by Welfare and Institution Code section 6601, subdivision (a) (2) or, if the current law was not retroactive, because the old law only permitted a two year commitment.

C. SHIELDS, BOURQUEZ, AND CARROLL.

The Shields, Bourquez, and Carroll courts, in effect, rejected the above analysis by, basically, fudging the retroactivity and jurisdictional issues claiming that to do otherwise would create an "absurd" result. (Carroll, supra, 158 Cal.App.4th at 510, Shields, supra, 155 Cal.App.4th at 564.)

Underlying Shields, Bourquez, and Carroll was a determination by the three courts that even though the current version of the sexually violent predator law does not make any provision for the recommitment of previously committed sexually violent predators, such a provision should be read into the law in order to accomplish the legislative intent underling the new enactment. Thus, the Shields' court determined that the "language of the statute should not be given a literal meaning if doing so would result in absurd consequences in which the Legislature did not intend . . . and statutory provisions may be added by implication when compelled by necessity and supported by firm evidence of the drafters true intent." (Shields, supra, 155 Cal.App.4th at 564. Internal quotes and citations omitted.) In Bourquez, the court determined that the

absence of an expressed savings clause applying the new law to previously committed persons was not fatal because, given the clear intent not to release the persons already committed as sexually violent predators, the courts could infer the existence of an implied savings clause. (Bourquez, supra, 156 Cal.App.4th at 1287-1288.) In Carroll the court that "[e]ven assuming Carroll's argument finds some support in the plain language of the statutes, it fails because it would result in absurd consequences the Legislature did not intend, and statutory provisions may be added by implication when doing so is compelled by necessity and supported by solid evidence of the drafters' true intent." (Carroll, supra, 158 Cal.App.4th at 510.) Each of these holdings was erroneous.

This is not a case where the statutory language is ambiguous and requires interpretation. Whether or not the failure to include a provision for recommitment was a mistake, at some point the Legislature and the voters have to be responsible enough to write laws that actually say what they mean and will be enforced based upon the written language of the law rather than a court's "correction" of their mistakes. In this case, the fact that numerous people were currently incarcerated as sexually violent predators and that, under the old version of the law, their commitments would expire and they would need to be recommitted was not unexpected.

Moreover, it is not necessary to order appellant immediately released in order to apply the law as drafted. If, indeed, it is a reasonable inference that neither the legislature nor the voters intended to release all previously committed sexually violent predators, there is another precedent. When the legislature repealed the former mentally disordered sex offender (MDSO) law, this Court, in Baker v. Superior Court (1984) 35 Cal.3d 663, concluded that the repeal was not intended to release persons already confined as MDSOs. Instead, the MDSO confinement procedures remain in effect to this day for persons who were committed under that system and not yet released. There is no reason a similar savings procedure could not be adopted in appellant's case. Persons who were committed as sexually violent predators subject to a two year commitment would continue to remain committed as sexually violent predators subject to the two year commitment and only those initially committed after the enactment of the indeterminate term would be subject to an indeterminate term. This interpretation of the law would serve both to adequately protect the public and avoid the "absurd" consequences that the Shields' court feared without simply ignoring the statutory language. In fact, there is no reason to assume that the drafters of Proposition 83 made a mistake and needed to be saved from that mistake. Instead, it is entirely possible that they assumed that their changes to the Sexually Violent Predator Law could not

be applied retroactively and, therefore, only newly committed persons would receive the indeterminate commitment. Persons already subject to a prior commitment would, of necessity, continue to receive the two year commitment. Under this interpretation, there was no need for the Proposition 83 to include a reference to recommitment because no one would ever be recommitted under its provisions.

In Bourquez, the court actually considered the implications of the MDSO appeal and cited Baker for the proposition that the search for legislative intent in that context was similar to the one present in the SVP context. However, in its analysis, the Bourquez court never considered the possibility that the appropriate result was to continue to impose two year commitments on previously committed sexually violent predators. This interpretation would in no way violate the purported intent behind the urgency legislation and Proposition 83 to strengthen the laws that punish and control sex offenders because the effects would still be applied prospectively to future sexually violent predators and the prior sexually violent predators would not be given what the courts have considered to be an unintended benefit.

If the current legislation operated retroactively to effect appellant, then the trial court lacked jurisdiction to commit appellant because the urgency legislation did not contain any provision for the recommitment of sexually

violent predators. On the other hand, if the current law is not retroactive then the trial court had no authority to impose an indeterminate term on appellant and, instead, should have imposed a two year commitment.

D. CONCLUSION.

The state cannot have it both ways. The only legal authority to recommit appellant was found in Welfare and Institution Code section 6604 and 6604.1 of the old law, but not the current law. The only legal authority to impose an indeterminate, rather than a two year, commitment was found in the current law. Because sections 6604 and 6604.1 of the current law replaced those sections of the old law, both laws cannot simultaneously be in effect. Therefore, this court should reverse the judgment of the trial court and order appellant immediately released or reinstate his two-year commitment.

CONCLUSION

This case presents significant and fundamental challenge to the integrity of the judicial system. The Los Angeles County Superior Court and the Los Angeles District Attorney made an agreement with appellant and 135 other people in a similar position. The parties to that agreement still wish to abide by the agreement but the attorney general and the Court of Appeal decided to break the agreement and arbitrarily impose an indeterminate commitment on appellant rather than the two year commitment which he was promised.

There is no significance state interest in breaking this promise. The promise effects only a comparatively small group of alleged sexually violent predators whose petitions were pending in Los Angeles County at the time the law changed. The agreement poses no risk to public safety because no one will be released under the agreement unless they prevail at trial. Instead, the only real beneficial effect to the state arising out of the Court of Appeal's ruling is that it will save the state the expense of conducting an additional trial for appellant and the other persons in his position. Appellant submits that when the integrity of the judicial system is weighed against the savings that the state could achieve by violating its promise, financial considerations must yield to the principles of justice and due process. Therefore, this court should reverse

the decision of the Court of Appeal and reinstate the two year commitment originally imposed on appellant.

Respectfully submitted,

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S171163

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	S171163
Plaintiff and Respondent,	B-202289
vs.	Los Angeles County No. ZM009280
JAVIER CASTILLO,	
Defendant and Appellant.	

CERTIFICATE OF WORD COUNT

I, RUDY KRAFT, declare as follows:

I am the attorney for Javier Castillo in this matter. This OPENING BRIEF ON THE MERITS was prepared using Microsoft Word 2003. According to that program's word count feature, this Brief contains 8,216 words.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 31, 2009, at San Luis Obispo, California.

RUDY KRAFT

DECLARATION OF SERVICE BY MAIL

I, RUDY KRAFT, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is P.O. Box 1677, San Luis Obispo, California 93406-1677.

On August 31, 2009, I served the attached OPENING BRIEF ON THE MERITS by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, by sealing and depositing said envelope in the United States mail at San Luis Obispo, California with postage thereon fully prepaid. There is delivery service by United States mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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