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.	

APPEAL FROM THE JUDGMENT OF THE

SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLEE STEVEN A. MARCUS, JUDGE

REPLY BRIEF ON THE MERITS

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By appointment of the
Court of Appeal under the
California Appellate Project
Independent Case System

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ARGUMENT

INTRODUCTION

Respondent's argument, at its core, is dependent on its failure to acknowledge the circumstances facing the parties and the Los Angeles County Superior Court when they made their agreement. The decision that Appellant would receive a two-year commitment, not an indeterminate commitment, was not some bizarre and irresponsible decision by the District Attorney to ignore the law. It was, instead, a rational and sensible way for the Los Angeles County District Attorney, Public Defender, and Superior Court to resolve an extremely complicated situation which had the potential to blow up in everyone's face.

At the time the parties made their agreement, no one knew how the new

statutes creating the indeterminate commitment would be interpreted. It is easy enough now, with the benefit of hindsight, to look at the Court of Appeal's opinions in Bourquez v. Superior Court (2007) 156 Cal.App.4th 1275, People v. Carroll (2007) 158 Cal.App.4th 503, and People v. Shields (2007) 155 Cal.App.4th 559, and conclude that an indeterminate commitment was the only available commitment.[1] However, that was not so clear at the time the parties negotiated their agreement. It was also possible that the courts would determine that the statute could not be applied retroactively and, therefore, persons would receive the two-year commitment in effect at the time their current petition was filed. It was even possible that the courts would enforce the literal language of the statute which included no provision for recommitment proceedings and order Appellant released.

This was not a one-sided deal that gave a huge advantage to Appellant and no advantage to the District Attorney. Not only did this agreement ensure that the Los Angeles County Superior Courts would not be swamped with SVP trials in 2006, it also ensured that Appellant would be subject to a two-year commitment, no matter how the appellate courts ruled. Based upon this agreement, had the appellate courts determined that because the statutes included no provision for recommitment proceedings, and no one could be

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[1] Of course, Appellant does not agree with the analysis in Carroll,

recommitted under the new version of the statutes, Appellant would have still been subject to a two-year commitment based upon the agreement.[2] During the course of that two-year commitment, the legislature would have had the opportunity to fix the statute so that Appellant would remain subject to an SVP commitment in the future.

Respondent further wants to take advantage of one of the inherent flaws of the appellate process to ensure that this court decides the case without full knowledge of the relevant facts and, even worse, by assuming that some things that are true are not true and vice versa. Thus, Respondent contended that this court could not consider the documents attached to the Amicus Curiae brief in the Court of Appeal and, instead, should simply assume that the agreement between the parties came into existence suddenly in October 2006 without any prior discussions or negotiations. In fact, as the exhibits attached to the Amicus brief reveal, the negotiation process had been going on for much of 2006 and was conducted in light of the Public Defender's announced intent to bring all 136 of its pending sexually violent predator cases to trial prior to the passage of Senate Bill 1128 or Jessica's Law. (Exhibit C attached to the

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Bourquez, and Shields.

[2] Of course, under those circumstances, Appellant would have been arguing, on appeal, that the recommitment was unauthorized by the statute and the Attorney General would have been arguing that the agreement was a valid and binding contract and that Appellant was estopped from challenging it.

Amicus Curiae brief at page 2.) Appellate counsel is informed and believes that a more detailed summary of the negotiations, submitted under penalty of perjury, will be attached to the Amicus Curiae brief filed by the Public Defender in this court. This court should treat both sets of documents as being properly before it and should not make its decision in the informational vacuum urged by Respondent.

This court should acknowledge the circumstances facing the parties below at the time that the agreement was negotiated and signed and consider whether the State of California would be well served by allowing the District Attorney and the Los Angeles County Superior Court to make a deal with Appellant in good faith only to have that deal thrown out later because the Attorney General wants to take advantage of a subsequent change in circumstances. This court should rule that the interests of the State of California are better served when its public officials are permitted and required to keep their word.

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

Respondent argued that this court should rule against Appellant on this issue because the issue was "not 'fairly included' with the issue on which this court granted review." (Answering Brief on the Merits (ABM) at 26.) In addition, Respondent argued that Penal Code section 1252 provides the appellate court with authority to address this issue when requested to do so by the Attorney General and that Government Code section 68081 gives the court the authority to raise and decide the issue on its own motion. Appellant disagrees with each of Respondent's arguments.

First, this issue was fairly included with the issue on which the court granted review. In granting review, this court elected to resolve the question of whether the Court of Appeal erred by increasing Appellant's commitment from two years to an indeterminate term. If, because Respondent did not file a Cross-Appeal, the Court of Appeal could not or should not have changed the length of Appellant's commitment then, clearly, the Court of Appeal erred in making that change. As a result, this argument falls squarely within the issue upon which this Court granted review.

Moreover, Respondent argued that "the absence of a Cross-Appeal involves a procedural issue that is not relevant to the substantive issue." (ABM

at 26.) However, that is not a good reason to avoid Appellant's claim relating to the Cross-Appeal. First, the dispute between Appellant and Respondent over the need for a Cross-Appeal demonstrates that this is an important unresolved issue. According to Respondent and the Court of Appeal, appellate courts can pretty much address any issue they want at any time. On the other hand, according to the authority cited by Appellant in this Opening Brief, appellate courts are not supposed to address claims that are not properly preserved and raised on appeal. There appears to be an unresolved conflict between Respondent's view of Government Code section 68081, which grants Courts of Appeal the authority to decide all issues whether raised and preserved or not and Appellant's interpretation of Code of Civil Procedure section 906, which appears to limit the authority of the Court of Appeal to address an issue absent the filing of a Notice of Appeal or Cross-Appeal. This issue is important and worthy of consideration.

Further, Appellant himself is personally entitled to have this issue resolved. After all, even if this court were to determine that, in the future, the Los Angeles County Superior Court must impose indeterminate commitments, not withstanding the agreement to impose two-year commitments, this court could and should still hold that Appellant himself is entitled to receive a two-year commitment because the State of California failed to file a timely Cross-

Appeal.

Respondent also argued that Penal Code section 1252 gives the Court of Appeal the authority to address this issue. That argument is completely wrong. Penal Code section 1252 governs appeals by criminal defendants in criminal cases. This is not a criminal case. Therefore, that statute has no applicability.[3]

Respondent also argued that, under Government Code section 68081, the Court of Appeal had the authority to raise and decide the issue on its own motion. Of course, that is not what happened. Respondent raised the issue, not the Court of Appeal. While this may seem like a distinction without a difference, it is not. If section 68081 effectively grants a party the right to raise any issue at any time because, after all, the Court of Appeal could have raised and addressed the issue on its own, then section 68081 completely supersedes all the statutory and case authority regarding a party's ability to file a Cross-Appeal.

Moreover, Government Code section 68081 does not constitute the massive expansion of judicial authority that Respondent appears to believe. Appellant suggests that that section is intended to ensure that parties have an

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[3] Of course, Appellant argued that this is a criminal case. However, the Court of Appeal ruled against Appellant and this Court did not grant review on that issue. If this Court rules in Respondent's favor based upon Penal Code section 1252, that ruling would call into the question of the constitutionality of Appellant's commitment under both the ex post facto and double jeopardy

opportunity to brief an issue before the Court of Appeal resolves a case based upon that issue. It comes into play when the Court of Appeal wishes to decide the appeal by addressing an issue that had not been raised by the parties. It does not extend the Court of Appeal's authority to overturn a judgment that had not been challenged by the filing of a Notice of Appeal or a Cross-Appeal. Thus, in Appellant's case, this provision would have permitted the Court of Appeal to, for example, seek briefing on the question of whether the single subject rule renders Jessica's Law unconstitutional, even though Appellant did not raise that issue, because Appellant filed a Notice of Appeal and challenged the constitutionality of Jessica's Law in his briefs. However, section 68081 would not allow the Court of Appeal to overturn Jessica's Law based upon the single-subject rule unless it gave the Attorney General the opportunity to brief the issue.

The only case cited by Respondent in support of its position, Walton v. City of Redbluff (1991) 2 Cal.App.4th 1117, actually supports Appellant's position. In Walton, the Respondent filed a Cross-Appeal. (Walton, supra, 2 Cal.App.4th at 120-121.) As a result, Walton cannot be viewed as authority granting the Court of Appeal the power to address an issue in the absence of a Cross-Appeal.

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provisions of the state and federal constitutions.

Instead, Walton is simply authority for the proposition that Government Code section 68081 requires the court to give the parties the opportunity to brief an issue that neither party had raised before the court issues an opinion addressing that issue. It does not stand for the proposition that the court can expand its jurisdiction beyond that granted to it by the notices of appeal filed by the parties.

Additionally, even though the Walton court asserted its authority to address an issue that had not been raised below, the court ultimately concluded that the City of Redbluff's failure to raise the issue in the trial court precluded consideration of the issue on appeal. (Walton, supra, 2 Cal.App.4th at 134.) The Court of Appeal reached this conclusion, notwithstanding the fact that there was no evidence that either party was aware of the issue in the trial court. As a result, the failure to address the issue below was not a deliberate choice of the parties. Yet, in Appellant's case, the parties and the trial court were well aware of this issue and reached an agreement on the issue. There was no oversight. Under such circumstances, there was simply no good reason for the Court of Appeal to ignore the State's failure to file a Cross-Appeal.

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

Respondent argued that this court should simply ignore the agreement reached by the parties below, because the two-year commitment was not authorized by law and imposing that commitment violated an important and strong public policy. Neither part of Respondent's argument was correct.

A. THE AGREEMENT WAS VALID.

In arguing that the Court of Appeal was not bound by the parties' stipulation, Respondent misstated the circumstances of the case. Although everyone has referred to the agreement between the parties and the Los Angeles County Superior Court as a stipulation, it is really more in the nature of a contract rather than a stipulation. Therefore, the case quoted by Respondent, San Francisco Lumber Co. v. Bibb (1903) 139 Cal. 325, 326, was not particularly on point. So far as the relatively short opinion in San Francisco Lumber Co. reveals, the stipulation at issue in that case was a stipulation as to the issues that could be considered by the court. On the other hand, the agreement in the current case was an agreement between the parties and the court. Only if the Attorney General and appellate counsel had entered into a stipulation purporting to limit the issues the Court of Appeal could address would the circumstances in Appellant's case be comparable to those in San

Francisco Lumber Co.

Respondent's frequent contentions to the contrary not withstanding, enforcing the agreement would not be contrary to the law or public policy. According to Respondent, the public policy underlining the change in the law was to allow "California to protect the civil rights of those persons committed as a sexually violent predator while at the same time protect[ing] society and the system from unnecessary or frivolous jury trial actions where there is no competent evidence to suggest a change in the committed person. (Historical Statutory Notes, 47C West's Ann. Pen. Code (2008) foll. Sec. 209 p. 53; Prop 83, sec. 2, subd. (k).)" (ABM at 9.) Of course, this goal represents a long-term goal of the statute which would not be frustrated simply by allowing previously pending cases to be resolved pursuant to this agreement. Obviously, the District Attorney, the Public Defender, and the Los Angeles County Superior Court could not enter into an agreement to impose two-year commitments on all sexually violent predators in the future even when the petition was filed after the effective date of the law. Such an agreement would clearly be in violation of the statute and would frustrate public policy. However, as Appellant discussed in length in his Opening Brief, the parties below were faced with significant problems in dealing with the new law and made a deal which protected all of their interests. Allowing the State of California to back

out of the deal after the fact, once the appellate courts interpret the law in a way that is favorable to the State's position, is hardly sound public policy.

Moreover, the primary goal of the SVP Law is to protect society from the dangers represented by alleged sexually violent predators. Other important goals are to provide treatment for and protect the civil rights of those persons committed as sexually violent predators. Avoiding a few additional trials is, at most, a tertiary goal. The goal of protecting society is not in jeopardy. Under the agreement, no one would be released unless a jury failed to find that the state had produced proof beyond a reasonable doubt that the person was a sexually violent predator. This adequately protects society even if an individual gets a second trial before receiving his indeterminate commitment. In fact, the agreement was, in fact, designed to protect society better than simply proceeding without an agreement, because the absence of provisions for recommitments in the current statute made it possible, even if not particularly likely, that some of the persons alleged to be sexually violent predators would have to be released. Similarly, if no such agreement had been forthcoming, it is possible that under People v. Litmon (2008) 162 Cal.App.4th 383 some of the individuals subject to the agreement would have been released based upon the state's inability to bring them to trial in a timely fashion.

Respondent failed to recognize that the agreement constituted a valid

and binding contract. Each of the parties gave consideration and received a benefit from the agreement. The Superior Court ensured that the SVP trials would come before it in an orderly fashion rather than all at once. The District Attorney received a guarantee that the cases would all be tried and that the persons would face a sexually violent predator commitment even if the statute, ultimately, was determined not to permit recommitment proceedings. Further, the District Attorney ensured that the cases would not all come to court at the same time with the attendant possibility that some of the petitions would have to be dismissed under Litmon. Finally, the public defender, and its clients, including Appellant, received a guarantee that they would get a two-year commitment in their next trial without having to rush to trial immediately. Each of the three parties gave something up and got something in return and they all did so in full knowledge of the potential issues and problems. This is exactly the sort of agreement which sound public policy endorses enforcing.

Respondent contended that the indeterminate commitment was only legally authorized term available in Appellant's case. In making this argument, Respondent relies on Bourquez, Shields, and Carroll. However, in response to Appellant's argument that Bourquez, Shields, and Carroll were wrongly decided, Respondent argued that that issue was not fairly included in the issue before this court. Obviously, there is a significant inconsistency in

Respondent's position. Respondent's claim that only the two-year commitment was available was entirely dependent on the validity of those cases.

That being said, however, even if those cases are assumed to be valid, it still does not follow that the Court of Appeal correctly changed Appellant's commitment to an indeterminate commitment. Respondent and the Court of Appeal chose to analogize the imposition of the two-year commitment to the imposition of an unauthorized sentence in criminal law. What Respondent, and the Court of Appeal, ignored, however, is that if that analogy is valid then this case is the equivalent of a case where an unauthorized sentence was imposed as part of a plea bargain and, because the unauthorized sentence could not be imposed, the only permissible remedy would be to remand the matter to the trial court to give the defendant the opportunity to withdraw from his plea agreement. Thus, even accepting Respondent's claim that the two-year commitment could not legally be imposed, the Court of Appeal should have remanded the case to the trial court with instructions to permit Appellant to withdraw from the agreement. Based upon that withdrawal, Appellant would then be entitled to receive a new trial at which he faced an indeterminate commitment.

B. ESTOPPEL.

1. Equitable estoppel.

Respondent argued that equitable estoppel should not be applied to this case for two distinct reasons. First, Respondent argued that equitable estoppel cannot be applied against a government body when doing so violates the explicit provisions of the statute at issue and "would contravene the public policy choices of the Legislature and the California electric." (ABM at 14.) In addition, Respondent argued that Appellant failed to make out the elements of equitable estoppel because the record does not support a conclusion that the people were aware of the true state of the facts and Appellant was unaware of them or that Appellant detrimentally relied on the agreement. Obviously, Appellant disagrees with Respondent's analysis on all of these issues.

Respondent quoted this court's decision in City of Goleta v. Superior Court (2006) 40 Cal.4th 270, 279, for the proposition that "equitable estoppel 'will not apply against a governmental body except in unusual circumstances when necessary to avoid grave injustice and when the result will not defeat a strong public policy.'" (ABM at 14.) Nevertheless, the City of Goleta court rejected the estoppel claim, not because the government body could not be estopped, but because the party did not demonstrate the elements necessary to establish the estoppel.

Nevertheless, this case does involve unusual circumstances and estopping the Government will not defeat an important public policy. As Appellant has detailed above, and in his Opening Brief, the parties below made this agreement in the face of unusual circumstances that could have created a severe problem for the Los Angeles County court system. The new policy of not giving allegedly sexually violent predators more than one jury trial will still take effect throughout the State. It is only the cases pending in Los Angeles County at the time of the agreement that are affected.

Another case cited by Respondent, City of Long Beach v. Mansell (1970) 3 Cal.3d 462, also supports the proposition that in an appropriate case estoppel will be applied against the Government. Respondent quoted City of Long Beach for the proposition that estoppel against a government agency must be carefully established in order to avoid the possibility that "by favoritism or otherwise, the public interest may be mulcted or public policy defeated." (ABM at 14 quoting Long Beach, supra, 3 Cal.3d at 495, fn. 30.) It seems self-evident that there is no danger that sexually violent predators are likely to be the beneficiary of favoritism by any governmental agency or official, and, while sexually violent predators might wish to mulct the public interest, they are unlikely to be given the opportunity to do so and certainly not

as a result of this case.[4] Likewise, enforcing this agreement will not defeat the primary public interest in protecting the public.

Respondent also argued that the fact that the defendant was arraigned and the trial court found probable cause on the new petition immediately after his trial in the current case somehow demonstrated the pointlessness of Appellant receiving a new trial. The reality, however, is significantly different.

Under the old law, SVP defendants were entitled to a trial every two years at which the state was required to prove, beyond a reasonable doubt, that they were sexually violent predators. While the legislature and the voters may have decided that this process was no longer necessary in the future, it was not, as Respondent implied, entirely pointless. In Appellant's case, even though he was arraigned immediately after his last trial, given the overcrowding of the Los Angeles County's SVP docket, Appellant's new trial at which he would face an indeterminate commitment is years away. By that time, Appellant's circumstances could have changed in any number of ways. Possibly, Appellant will progress through the treatment program to the point where the Department of Mental Health panel evaluators will believe that he no longer qualifies as a

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[4] Of course, the State of California is paying more than $100,000 per year to provide sexually violent predators with room and board. Arguably, that might constitute mulcting the public but, if so it is the public that has made this choice, not the sexually violent predators.

sexually violent predator.[5] Possibly, Appellant's health might deteriorate to the point where he is no longer a sexually violent predator. Possibly a jury will find Appellant's case more convincing in the future then they did in the past. All of these are possibilities were well within contemplation of Appellant and his trial attorney when they made the agreement that entitled Appellant to another jury trial.

Respondent also argued that Appellant did not establish all the elements of equitable estoppel. In particular, Respondent claimed:

> First, the record does not support the conclusion that the People were aware, but appellant was unaware, of the true state of the facts, nor does the record indicate that the People concealed or misrepresented the true facts. In particular, the record does not show that the District Attorney (but not appellant) entered into the stipulation with the knowledge that the stipulation was unauthorized and legally unenforceable, that the Attorney General would subsequently challenge the stipulated two-year term on appeal, and that the Court of Appeal would agree with the Attorney General's position. To the contrary, all parties to the stipulation apparently believed that the stipulation was proper and enforceable.
>
> Second, appellant cannot establish the element of detrimental reliance.

(ABM at 16.) There are two significant problems with Respondent's analysis. First, in effect, Respondent's argument relating to the People not being aware,

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[5] It's worth noting that while members of the Department of Mental Health evaluator's panel have changed their minds about whether given individuals qualify as sexually violent predators, the Department of Mental Health itself never has. No one has ever been found to no longer be a sexually violent predator based upon an annual review and released under Welfare and

and Appellant unaware of the true state of the facts, simply boils down to a claim that equitable estoppel should not be imposed when the Attorney General makes a policy decision to turn the District Attorney into a liar. Or, to put it another way, equitable estoppel will not be applied against the State of California when one state agency that makes the factual assertion truly means it, but a different agency intends to follow a different policy.

It is important to recognize that the party in this case is not the District Attorney of Los Angeles County or the Attorney General of the State of California, but the People of the State of California who were represented by two different attorneys. Nevertheless, "agents of the same government are in privity with each other since they represent not their own rights but the government." (People v. Sims (1982) 32 Cal.3d 468, 487; Tennison v. California Victims Compensation and Government Claims Board (2007) 152 Cal.App.4th 1164, 1174-1175.) Therefore, if the Attorney General, not the District Attorney, has the final say on this issue, then the People of the State of California told Appellant one thing when something else was in fact true. Appellant was unaware of the fact that the assertion made by the District Attorney that he would only receive a two-year commitment was factually untrue—or at least he was unaware of the fact that the Attorney General had

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Institutions Code section 6605.

the authority to arbitrarily overrule the District Attorney's decision.

Respondent also argued that Appellant could not establish detrimental reliance. In making this argument, Respondent claimed that the record is inadequate to support Appellant's claim of detrimental reliance. While Appellant believes that the record establishes the existence of detrimental reliance, Respondent's claim brings into focus one of the fundamental problems with the appellate system—at least in this case.

At the trial court level, when the proceedings that would ultimately become the record on appeal were being conducted, no one had any reason or ability to make a clear record on the issue of detrimental reliance. As the documents attached to the Amicus Curiae brief in the Court of Appeal reveal, the negotiations relating to the stipulation were ongoing through much of 2006 but there was no reason to put anything about those negotiations on the record unless there was some specific problem that needed to be brought to the trial court's attention in open court. Certainly, it is unreasonable to expect Appellant to announce in February 2006 that he was not seeking an immediate trial because he was detrimentally relying on the stipulation that was being negotiated between his attorneys and the District Attorney.

In fact, this illustrates the problem with permitting the Attorney General to raise this issue without filing a Cross-Appeal. Had Appellant wished to raise

an issue like this one, he would have been required to do so by extraordinary writ and to attach exhibits creating the record necessary to support his claim. Yet, no such limitation was imposed on the Attorney General's ability to raise this issue. The Court of Appeal did not require the Attorney General—the party challenging the verdict below—to produce any evidence supporting its position. Instead, the Court of Appeal simply accepted the Attorney General's speculative assertions that Appellant did not detrimentally rely on the stipulation on agreeing to continuances.

If this court believes that the record is inadequate on this issue, the appropriate remedy is not to assume that the Attorney General's speculations are correct. Instead, this Court should remand the matter to the trial court to conduct the evidentiary hearings necessary to create the full record both of the negotiation process for the stipulation and Appellant's detrimental reliance on the District Attorney's assertions and promises.

Respondent also argued that this court should recognize that because the stipulation was actually signed and filed after the enactment of Senate Bill 1128, "appellant cannot establish detrimental reliance because the yet-unsigned and yet-unfiled stipulation did not affect his decision-making prior to the effective date of Senate Bill 1128." (ABM at 18.) Yet, the exhibits attached to the Amicus Curiae brief in the Court of Appeal demonstrate quite clearly that

the parties knew that the stipulation was going to be signed well before its actual filing date. In effect, Respondent is calling upon this court to ignore the actual facts when making its decision and, instead, make the decision based upon Respondent's speculations which are, at least in part, clearly not true. This court should decline such an unsavory invitation.

2. Promissory Estoppel.

Respondent also argued that promissory estoppel did not apply, both for policy reasons and because the record does not support Appellant's claim of detrimental reliance. The analysis of both these issues is the same in a promissory estoppel context as it was in an equitable estoppel context. The only significant difference is Respondent did not and cannot argue that there was no promise upon which the District Attorney would have expected Appellant to rely. Obviously, there was such a promise.

3. Judicial Estoppel.

Finally, with respect to judicial estoppel, Respondent's only argument boils down to a claim that the public policy underlying the creation of indeterminate commitments for sexually violent predators is so important that it outweighs the application of judicial estoppel. Respondent made no claim that the elements of judicial estoppel were not met, only that this court should not enforce that estoppel for policy reasons.

The only case cited by Respondent in support of its argument on judicial estoppel is In re Marriage of Jackson (2006) 137 Cal.App.4th 980. At the outset, Appellant notes that it is probably not a good idea to use Michael Jackson litigation as precedent in other unrelated proceedings.

In any case, the policy reasons weighing against the application of judicial estoppel in the Jackson case were significantly different from the policies in this case. In the Jackson case, the parties entered into a stipulated agreement for a judgment terminating the parental rights of Michael Jackson's ex-wife, Deborah Rowe. The trial court went along with the process without following the mandatory process necessary to terminate parental rights. In particular, the court failed to consider the best interest of the children. (Jackson, supra, 136 Cal.App.4th at 994-996.) In effect, the children were an unrepresented party whose interests were not protected and addressed in the initial litigation.

The circumstances of Appellant's case are significantly different. There was no unrepresented party equivalent to the children and, the trial court was an actual party to the agreement, not merely a rubber stamp. The agreement itself was designed to deal with a number of serious policy considerations, all of which justified entering into a contractual arrangement in which each of the parties gave up something and got something in return. Moreover, parental

rights, when terminated, are gone forever to the potential detriment of the children.[6] Nothing comparable would be irretrievably lost by enforcing this agreement. Appellant will still be in custody. He will simply get an additional trial.

Further, this is a case where applying the doctrine of judicial estoppel is particularly appropriate. Appellant is not seeking an undeserved or unearned benefit. Instead, it is the State of California that elected to change its mind when it became convenient to do so. If that does not qualify as trifling with the courts, then nothing does.

C. WAIVER AND ESTOPPEL.

Respondent also argued that the waiver and forfeiture did not apply because "[a] litigant may raise an issue for the first time on appeal if the issue is a pure question of law with undisputed acts, or if the issue involves a matter of important public interest." (ABM at 24 citing Hale v Morgan (1978) 22 Cal.3d. 388, 394.) This is not such a case.

This is not a pure question of law of undisputed facts. It is a mixed question of fact and law where at least some of the facts cannot be found in the appellate record because there was simply no occasion to make a record of

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[6] Given the recent subsequent developments, we now know that had Rowe's parental rights been permanently terminated, her children would now have no parent.

those facts and because Respondent, the party challenging the validity of the trial court judgment, did not even attempt to make such a record during the course of the appellate process.

It is also not a case where the waiver and forfeiture should not be applied because the case involves a matter of important public interest because, as discussed, it really doesn't. If the validity of the entire sexually violent predator commitment scheme was at issue, then there certainly would be an important public interest in this case. However, there is no important public interest in whether the comparatively small number of persons subject to the stipulation in Los Angeles County get another trial or not.

Respondent also argued that the issue was not waived because "[t]here is nothing in the record to suggest that the District Attorney affirmatively 'waived' or relinquished the Attorney General's ability to challenge the two-year commitment order on appeal." (ABM at 24.) In making this argument, Respondent conveniently ignores the fact that, as discussed above, the Attorney General and the District Attorney were in privity. When the District Attorney expressly waived any claims like the one the Attorney General is now making, it was the People of the State of California who waived the claim. The Attorney General is not a separate and independent party. It is just a different attorney for the People of the State of California. The situation is no different

from that of a private litigant who waived an issue in the trial court arguing that the issue was not waived on appeal simply because he hired a new attorney. Any such argument would be laughed out of court.

Similarly, by claiming that the indeterminate term was not a "right" that the people could abandon or relinquish, Respondent is playing semantic games. Under Respondent's view of the statute, the indeterminate term was mandatory. Yet, somehow, it did not constitute a "right" because, "instead, the indeterminate term was a mandatory legal consequence of the jury's verdict that appellant qualified as an SVP." (ABM at 25.) Initially, Appellant notes that waiver involves "the intentional relinquishment or abandonment of a known right or privilege." (People v. Giles (2007) 40 Cal.4th 833, 849. Emphasis added.) Respondent did not argue that this case does not involve a privilege. Of course, such semantic games are beside the point. Respondent cited no authority for the proposition that the waiver doctrine requires a careful analysis of what is waived to make sure it falls within the legal category of "right" or "privilege" and not some other category such as a "mandatory legal consequence." In fact, the Respondent's perspective on this is strange. Parties to litigation frequently waive things that could be characterized as "mandatory legal consequences." Certainly, for example, a jury trial is a "mandatory legal consequence" arising out of the filing of criminal charges, but the defendant

can waive that right. The District Attorney knew what it was doing when it waived its authority to impose an indeterminate commitment on Appellant. That waiver should be enforced.

D. DUE PROCESS.

Respondent argued that Appellant's due process argument was invalid because "appellant cites no pertinent authority to support the proposition that due process requires the Court of Appeal to enforce or uphold a stipulation or agreement that was legally unauthorized." (ABM at 25.) In making this argument, Respondent failed to recognize that, at least with respect to a constitutional due process argument, its view of what the statute might require is not necessarily significant. As Appellant argued in his Opening Brief, an individual has a due process right to expect that the government will abide by the agreements it makes with him. This is particularly true when the agreement involves the terms under which the individual might be confined for the rest of his life. Even if the agreement was "legally unauthorized", as a matter of California statutory interpretation, that says nothing about whether violating the agreement deprived Appellant of his due process rights. Certainly, Respondent did not address Appellant's argument based upon Santobello v. New York (1971) 404 U.S. 57.

Respondent's second argument on this issue--that the stipulation only

promised that the District Attorney would not seek a two-year commitment and did not purport to bind the Attorney General--is frivolous. Clearly, the import of the agreement was that the State of California would only seek to commit Appellant for two years in his upcoming trial. To suggest that the agreement only intended to bind the District Attorney of Los Angeles County not the Attorney General of the State of California is so unlikely to be true that it is difficult to view Respondent's argument on this issue as anything but disingenuous. As Appellant has discussed above, the District Attorney and the Attorney General were in privity and represented the same party, the People of the State of California. A promise by the District Attorney binds the State of California. Surely, if the Los Angeles County's Public Defender had known that the agreement was only intended to bind the District Attorney, not the Attorney General, there would have been no agreement. Moreover, if the District Attorney deliberately included this provision in the contract intending to fool Appellant and the Public Defender into thinking the State was bound by the agreement, then the contract was procured by fraud. In effect, Respondent is arguing that the State of California is allowed to deceive litigants by having one attorney make promises to them and another attorney refuse to keep them. Surely, that is not a procedure that would comport with due process.[7]

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[7] One can imagine the hearing this court would give to a defendant who

E. CONCLUSION.

Although Respondent made a large number of arguments purporting to support its position, none of those arguments justify the Court of Appeal's decision in this case. Appellant made a deal with the District Attorney and the Superior Court of Los Angeles County. That deal was made for perfectly good reasons and all parties understood the deal they were making at the time they made it. The State of California should not be allowed to arbitrarily unilaterally change the terms of the agreement after the fact when it becomes convenient to do so.

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makes a similar claim on appeal. Could an SVP defendant stipulate at the trial court to the existence of the predicate prior and then argue insufficient evidence based upon the fact that the trial attorney entered into the stipulation with the District Attorney, but the appellate attorney did not enter into any such stipulation with the Attorney General? Of course not.

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.

Respondent argued that this issue was not fairly included within the issue on which this court granted review. Appellant disagrees.

The entire premise underlying the Court of Appeal's ruling changing Appellant's two-year commitment into an indeterminate commitment was that the three cases addressing the retroactivitiy of the indeterminate commitment, Bourquez v. Superior Court (2007) 156 Cal.App.4th 1275, People v. Carroll (2007) 158 Cal.App.4th 503, and People v. Shields (2007) 155 Cal.App.4th 559, were correctly decided. If, as Appellant argued, those cases were not correctly decided then Appellant was subject only to a two-year commitment. If so, the Court of Appeal erred in changing his two-year commitment into an indeterminate commitment. It is difficult to see how an issue so fundamental to the disputed issue could not be fairly included in this court's grant of review.

Respondent did not really address the merits of Appellant's argument other than to assert that the Courts of Appeal had correctly decided this issue in Carroll, Bourquez, and Shields. Since Appellant has already addressed the flaws in those opinions in his Opening Brief, he will not repeat them here.

CONCLUSION

This case presents a 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 significant state interest justifying the breaking of 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 Reply Brief On The Merits was prepared using Microsoft Word 2003. According to that program's word count feature, this Brief contains 6,980 words.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 10, 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 December 10, 2009, I served the attached Reply 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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