FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY

NO. 38269-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

IN RE THE DETENTION OF SHELDON MARTIN

STATE OF WASHINGTON,

Respondent,

v.

SHELDON MARTIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court erred in denying Mr. Martin's motion to dismiss the petition for commitment with prejudice and instead granting the State's motion to dismiss without prejudice.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

In In re Detention of Sheldon Martin, 163 Wn.2d 501, 182 P.3d 951 (2008), the Supreme Court held that the petition seeking Sheldon Martin's commitment as a sexually violent predator was filed without statutory authority and ordered the Thurston County Superior Court to grant Mr. Martin's motion to dismiss the State's petition. Did the trial court err in granting the State's subsequent motion to dismiss the petition without prejudice instead of granting Mr. Martin's motion to dismiss the petition with prejudice?

C. STATEMENT OF THE CASE

Sheldon Martin has committed no sexually violent offenses in Washington, and no offenses of any kind in Thurston County. Martin, 163 Wn.2d at 504, 516. Nevertheless, the attorney general's office, at the request of the Thurston County prosecutor, filed a petition for Mr. Martin's commitment as a sexually violent predator in Thurston County Superior Court. Id. at 505.

Mr. Martin filed a motion to dismiss for lack of statutory authority, asking the court to "dismiss the petition against him, and release him immediately." Supp. CP ___ (Sub no. 62) (Motion to Dismiss) at 9. Mr. Martin argued that the statute allows only "the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney [to] file a petition alleging that the person is a sexually violent predator." Id. at 7 (citing RCW 71.09.030). The trial court denied the motion, ruling that RCW 71.09.030 did not limit a prosecutor's authority to seek commitment to those counties where the respondent committed a sexually violent offense. Martin, 163 Wn.2d at 505-06.

The Court of Appeals affirmed, but the Supreme Court reversed, holding "the language in the statute unambiguously authorizes a specific prosecutor to initiate commitment proceedings." Id. at 505. "The Thurston County prosecutor could not file this commitment petition, or request the attorney general's office to file it, because the Thurston County prosecutor never convicted or charged Martin with an offense." Id. at 506.

The State argued that following Mr. Martin's logic, no county in Washington would have the authority to initiate commitment

proceedings against those whose predicate convictions occurred out-of-state. The Court responded that the absence of statutory authority to petition for Mr. Martin's commitment (or for the commitment of others whose predicate convictions occurred out-of-state) was a matter for the legislature:

> [O]mitting authority to commence commitment proceedings based on an out-of-state conviction does not create an absurd or obviously unintended result. Without some declaration that the legislature intended the Thurston County (or every county) prosecutor to file the commitment petition when the predicate offense occurs out-of-state, we cannot sanction such an unfettered grant of authority considering the express grant of authority contained in RCW 71.09.030.

Id. at 514.

The Court accordingly reversed the order of commitment "with directions to grant Sheldon Martin's motion to dismiss the State's petition." Id. at 516.

But the trial court did not grant Mr. Martin's motion for dismissal and release. Instead, it granted a new motion from the State to dismiss the case *without* prejudice, which Mr. Martin

opposed. CP 109-10.[1] Mr. Martin has now spent over five years in confinement as a result of the unlawful petition.

Mr. Martin timely appealed. CP 120. A commissioner of this Court ruled that the trial court's order was appealable as of right, and this Court denied the State's motion to modify the commissioner's ruling.

D. ARGUMENT

THE TRIAL COURT'S REFUSAL TO COMPLY WITH THE SUPREME COURT'S DIRECTIVE TO GRANT MR. MARTIN'S MOTION TO DISMISS MUST BE REVERSED.

Under the "law of the case" doctrine, a decision of the appellate court is binding on further proceedings in the trial court on remand . State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003). "The courts apply the doctrine in order to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts." Id. (internal citation omitted). The judgment of the Supreme Court is final and conclusive upon all parties properly before it; the superior court can only enforce such a

[1] In the meantime, before complying with the order to dismiss the petition and release Mr. Martin, the State filed a new petition for commitment in Clark County. That case is not a part of the instant appeal.

judgment, and is powerless to change it. RCW 2.04.220; SAR 3; State ex rel. Schock v. Barnett, 42 Wn.2d 929, 932, 259 P.2d 404 (1953).

In this case, the Supreme Court directed the Thurston County Superior Court to "grant Sheldon Martin's motion to dismiss the State's petition." Martin, 163 Wn.2d at 516. The superior court refused, instead granting the State's motion to dismiss without prejudice. CP 109-10. This Court should reverse the superior court's order denying Mr. Martin's motion to dismiss with prejudice, because it contravenes the supreme court's directive.

The State argues that because the supreme court ordered dismissal but did not use either the phrase "with prejudice" or "without prejudice" that the trial court was free to grant the State's motion to dismiss without prejudice. This argument is without merit. A dismissal for failure to state a claim on which relief can be granted is by default *with* prejudice. 3A K. Tegland, Washington Practice, Rules Practice at 266 (5th ed. 2006) (citing CR 12(b)(6)). Dismissal without prejudice should not occur unless the Court explicitly directs it. Id. The supreme court did not direct dismissal without prejudice; accordingly, the court was required to grant Mr. Martin's motion to dismiss with prejudice.

This Court's decision in Foss v. Department of Corrections is instructive. 82 Wn. App. 355, 918 P.2d 521 (1996). There, a group of teachers sued the Department of Corrections ("DOC") because the college for which the teachers worked did not renew their contracts after DOC denied them access to a prison. Id. at 358. The trial court denied DOC's CR 12(b)(6) motion to dismiss for failure to state a claim on which relief could be granted, but this Court reversed. Id. at 367. This Court held that "the teachers were without statutory authority to petition the superior court for review of the DOC's decision" and therefore reversed and dismissed the teacher's petition *with prejudice.* Id. at 362, 367. Similarly here, the Thurston County prosecutor was without statutory authority to petition the superior court (or to ask the attorney general to petition the superior court) for Mr. Martin's commitment. Accordingly, this Court should reverse and dismiss the petition with prejudice.

The State also complains that the case should not be dismissed with prejudice because Mr. Martin might commit a new predicate offense in Washington and the State should be allowed to file a petition for commitment in that event. CP 108. But dismissing *this* petition with prejudice would not bar a future petition with new allegations, any more than dismissing a criminal case with

prejudice prevents the filing of future charges for new crimes. If Mr. Martin commits a sexually violent offense in Washington, the State is free to file a new petition (not to mention a criminal charge), because it would be a new and different claim.

The current claim, however, must be dismissed with prejudice because the Thurston County prosecutor lacked the authority to initiate proceedings against Mr. Martin. Martin, 163 Wn.2d at 506. Indeed, no prosecutor in Washington had the authority to initiate commitment proceedings, because Mr. Martin's predicate offenses occurred in Oregon. RCW 71.09.030. As the supreme court explained, it is up to the legislature to fill that gap, not the courts. Martin, 163 Wn.2d at 514.[2] This Court should reverse the trial court and remand for entry of an order dismissing the petition with prejudice.

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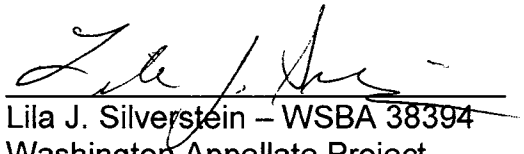
[2] The legislature passed a bill last week that would allow for future filings against individuals whose only predicate convictions occurred out-of-state in limited circumstances. Section 3 of Substitute Senate Bill 5718 amends RCW 71.09.030 to provide, in relevant part, "(2) The petition may be filed by [t]he prosecuting attorney of a county in which ... [t]he person committed a recent overt act, or was charged or convicted of a criminal offense that would qualify as a recent overt act, if the only sexually violent offense charge or conviction occurred in a jurisdiction other than Washington." SSB 5718 was sent to the governor on April 25, 2009. http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5718.

E. CONCLUSION

For the reasons set forth above, Mr. Martin respectfully requests that this Court reverse the trial court and remand for entry of an order dismissing the petition with prejudice.

DATED this 30th day of April, 2009.

Respectfully submitted,



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SHELDON MARTIN,	)	NO. 38269-5-II
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	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF APRIL, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	ELIZABETH BAKER MALCOLM ROSS OFFICE OF THE ATTORNEY GENERAL CRIMINAL JUSTICE DIVISION 800 FIFTH AVE. SUITE 2000 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	SHELDON MARTIN SPECIAL COMMITMENT CENTER PO BOX 88600 STEILACOOM, WA 98388-0647	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF APRIL, 2009.

X_____

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