THE CALIFORNIA SUPREME COURT'S UNLAWFUL USE OF LEGISLATIVE HISTORY TO INTERPRET UNAMBIGUOUS STATUTES DURING ITS 2005 TERM

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I. Introduction.

A large part of the California Supreme Court's job is to interpret the statutes that the California Legislature has enacted. The Court has developed clear rules for this task. One of the rules is that courts may rely on legislative history if and only if the statute being interpreted is ambiguous. However, as a review of the Court's recent Term from September 2005 to August 2006 reveals, the Court consistently violates this important rule. This article considers four cases in which the Court used legislative history to "confirm" the meaning of an unambiguous statute, and one case in which the Court used legislative history to change an unambiguous statute's meaning. It concludes with suggestions for improving the Court's performance.

II. The Court's rules of statutory interpretation prohibit it from relying on legislative history if the statute is unambiguous.

According to the Court, its charge when interpreting statutes is "to ascertain the Legislature's intent so as to effectuate the purpose of the law."[1] "Because the statutory language is generally the most reliable indicator of that intent, we look first at the words themselves, giving them their usual and ordinary meaning."[2] The words "must be read in context, considering the nature and purpose of the statutory scheme."[3]

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[1] *Hunt v. Superior Court*, 21 Cal.4th 984, 1000, 90 Cal.Rptr.2d 236 (1999).

[2] *Stephens v. County of Tulare*, 38 Cal.4th 793, 802, 43 Cal.Rptr.3d 302 (2006).

[3] *Hunt*, 21 Cal.4th at 1000.

"If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs."[4] In other words, "[i]f it is clear and unambiguous our inquiry ends."[5] In that case, "[t]here is no need for judicial construction and a court may not indulge in it."[6] "Only when the language of a statute is susceptible to more than one reasonable construction is it appropriate to turn to extrinsic aids, including the legislative history of the measure, to ascertain its meaning."[7] By "legislative history," the Court apparently means to include written documents (such as legislative committee reports) as well as legislative actions (such as prior versions of the statute and the treatment of proposed amendments, whether adopted or rejected).[8]

III. There are a number of good reasons why the Court should not rely on legislative history to interpret an unambiguous statute.

There are good reasons why courts should not look at a statute's legislative history when the statute is unambiguous. First, it is powerfully true, verging on ridiculous understatement, that the "most reliable indicator" of the Legislature's intent is the words that the Legislature used. The Legislature enacts law solely by passing a bill.[9] It is unclear why the Legislature

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[4] *Hunt*, 21 Cal.4th at 1000.

[5] *Diamond Multimedia Systems v. Superior Court*, 19 Cal.4th 1036, 1047, 80 Cal.Rptr.2d 828 (1999).

[6] *Id*.

[7] *Id*. at 1055.

[8] *See generally Kaufman & Broad Communities v. Performance Plastering*, 133 Cal.App.4th 26, 31-39, 34 Cal.Rptr.3d 520 (2005) (gathering examples of cognizable legislative history).

[9] Cal. Const., Art. IV, Sec. 8(b).

would enact a bill but intend that something else become law. When the Court looks to legislative history for legislative intent, it risks misinterpreting that intent.

Second, given that the Court has clearly announced the rule, it should comply with it. It is embarrassing for the Court to say that it will treat the Legislature as meaning what it says if the Court itself does not mean what it says.

Third, when the Court consults legislative history to interpret an unambiguous statute, the Court increases the cost of litigation to the litigants and to the taxpayers. Absent an assurance that legislative history is irrelevant, counsel must expend the resources needed to analyze and make any non-frivolous arguments based on legislative history, just in case. The Court itself spends needless time and effort, diverting its resources from other pending cases. Lower courts, who take their cues from the Supreme Court, must find time in their busy schedules to address legislative history as well.

Fourth, when the Court relies on legislative history notwithstanding an unambiguous statute and notwithstanding its promise that it will not do so, the Court undermines and introduces needless confusion into the legislative process. Statutes are often a product of bargaining. In order to bargain effectively, legislators must know what will be treated as law. If the Court always treats the plain meaning of a statute's text as law, then a rational legislator will focus on the text. If, however, the Court sometimes, or often, or always, looks to legislative history in addition to the text, then the rational legislator will focus on the legislative history as well as the text. It is self-evidently wrong to lull the trusting legislator to sleep by falsely stating that a statute's plain text governs, only to give effect to the legislative history instead.

Finally, and most important, when the Court considers legislative history when the statute is unambiguous, the Court risks creating an ambiguity. After all, if legislative history can confirm that an unambiguous statute means what it says, then legislative history can also call into question whether an unambiguous statute means what it says. Ultimately, if the text of an unambiguous statute always governs, then consideration of legislative history is pointless at best, but dangerous at worst.

IV. The Supreme Court does not follow its own rule.

A. The Court often considers legislative history even though it concludes that the statute is unambiguous.

Even though the Court says it may not look at legislative history if the statute that it is interpreting is unambiguous, that is precisely what the Court frequently does. A typical example this past Term was *Stephens v. County of Tulare*[10]. In *Stephens*, a county employee who had left his job on account of a work-related injury petitioned for a writ of mandate directing the county to reinstate him.[11] The Supreme Court ruled in favor of the county. The issue was whether the plaintiff was "dismissed" from his county job as defined by Government Code Section 21725. That statute requires an employer to reinstate certain employees where "the employer has dismissed the member for disability" and the county board of retirement determines that the member is not incapacitated.[12] Stephens was told that he could not be accommodated "at this

[10] 38 Cal.4th 793, 43 Cal.Rptr.3d 302 (2006).

[11] *Id*. at 800.

[12] *Id*. at 800-01.

time," and was instructed to submit time sheets reflecting "off duty/sick/personal" until his medical condition improved and he was able to return to work with no restrictions.[13]

The Court held that to "dismiss" means to "send or remove from employment,"[14] and as used in connection with Section 31725 is synonymous with "terminated" and "released," in that each word "describe[s] a circumstance in which the employment relationship, at the employer's election, has ended."[15] The Court held that "applying the plain meaning of section 31725 to the facts of this case supports the county's position that it never dismissed Stephens from his job,"[16] given that Stephens was told to submit time sheets until he was able to work.

Under the law as the Court has stated it, that should have been the end of the analysis. However, the Court stated in the very next sentence, "[o]ur conclusion is consistent with the legislative intent underlying the statute, as demonstrated by its legislative history."[17] It proceeded to spend five paragraphs analyzing Section 21725's legislative history, including a lengthy quotation from a Report of the Assembly Committee on Public Employment and Retirement.[18] However, because the Court had already determined the statute's unambiguous meaning, this analysis of legislative history was gratuitous and impermissible.

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[13] *Id*. at 802-03.

[14] *Id*. at 802 (citing Webster's 3d New Internat. Dict. (2002) p. 652).

[15] *Id*. at 802.

[16] *Id*. at 804.

[17] *Id*. at 804.

[18] *Id*. at 804.

A similar example last Term was *People v. Corpuz*.[19] In *Corpuz*, the defendant was convicted of felony stalking in violation of a court order.* The court of appeal reduced his sentence, and the Supreme Court reversed.* The issue was whether a stay away order imposed as a condition of probation is included within the phrase "any other court order," the violation of which is a violation of the stalking statute, Penal Code Section 646.9(b).* The Court's analysis ran twelve lengthy paragraphs.* In the first two paragraphs, the Court quoted and paraphrased the pertinent language in the stalking statute. In the next sentence, the Court held that "[t]he plain language of the relevant condition—'or any other court order'—includes a stay-away order issued as a condition of probation."[20]

Having determined that one side wins under the plain language of the statute, the inquiry should have ended according to the Court's own rules. However, the Court then spent the next nine and one-half paragraphs—by far the bulk of the opinion—analyzing the statute's legislatively history.[21] It introduced this superfluous and inappropriate analysis with the announcement that "[a]ny ambiguity or doubt in this respect" is "dispelled by the history of the provision"—but the Court did not hold that the statute was ambiguous.[22] The Court quoted extensively from Legislative Counsel's Digests regarding older versions of the statute, and noted that **certain proposed amendments were themselves amended** before they were enacted into

[19] 38 Cal.4th 994, 44 Cal.Rptr.3d 360 (2006).

[20] *Id*. at 997.

[21] *Id*. at 997-1000 & nn. 2-4.

[22] *Id*. at 997.

law.[23] The Court held that the statute's legislative history dispelled any ambiguity that the Court did not find exists.[24]

A third example was *In re Marriage of Fellows*.[25] In *Fellows*, a child's mother registered a child support order in California 17 years after it had been entered by a New York court, alleging that the father had never made support payments and owed her over $26,000.[26] The trial court confirmed the registration and ordered arrearage payments, and the Supreme Court affirmed.* The issue was whether the Legislature intended that Family Code Section 4502(c), which bars a parent from relying on laches to defend an action to enforce a child support order, should apply retroactively to cases such as this.*

The Court held that the answer was provided by Section 4(c) of the Family Code, which provides, "[s]ubject to the limitations provided in this section, the new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including but not limited to, commencement of a proceeding, making of an order, or taking of an action."* The Court held that "by its terms, section 4, subdivision (c), establishes that amendments to the Family ***[**C]ode** apply retroactively unless otherwise provided by law."[27]

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[23] *Id*. at 997-99 & nn. 2-3. This is so even though, as the Court has acknowledged, "unpassed bills have little value in ascertaining legislative intent." Garcia at 21 n.7.

[24] *Id*. at 999-1000.

[25] 39 Cal.4th 179, 46 Cal.Rptr.3d 49 (2006).

[26] *Id*. at 50.

[27] *Id*. at 54.

However, in the next sentence, the Court began to analyze Section 4's legislative history, such as the Law Revision Commission comment to Section 4, determining that the legislative history "confirms" the unambiguous meaning of the statute's text.[28] Once again, this use of legislative history to confirm an unambiguous statute was unnecessary and impermissible.

The reader is beginning to see that these are part of a consistent pattern, not stray errors. Yet a fourth example was *People v. Johnson*.[29] In *Johnson*, the defendant moved to suppress evidence gathered during a warrantless search and seizure. The trial court granted the motion, and the Supreme Court affirmed the trial court's ruling.* The issue was whether the prosecution at a suppression hearing could meet its burden of proving justification for a warrantless search and seizure by presenting an affidavit of the investigating officer in lieu of the officer's live testimony.[30]

The Court first analyzed the language of the pertinent statutes, Penal Code Sections 1538.5 and 1539. The Court noted that the statutes contain numerous references to "witnesses" at the suppression hearing: "While a witness is under examination during a hearing…"[31]; at the hearing "the judge or magistrate shall...[e]xclude all potential and actual witnesses who have not been examined,"[32] "[o]rder the witnesses not to converse with each other…," or "[o]rder, where

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[28] *Id*. at 54.

[29] 38 Cal.4th 717, 42 Cal.Rptr.3d 887 (2006).

[30] *Id*. at 720.

[31] Penal Code Section 1538.5(c)(2).

[32] Section 1538.5(c)(2)(A).

feasible, that the witnesses be kept separated from each other…"[33]; at a special hearing after the preliminary hearing "the people may recall witnesses who testified at the preliminary hearing"[34]; and ***"**at** a special hearing is held in a felony case, the judge or magistrate shall proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated by a shorthand reporter…"[35]

The Court held that "the language of Penal Code sections 1538.5 and 1539 reasonably must be interpreted to require the parties to present testimony at the hearing through live witnesses, whose demeanor and credibility can be evaluated by the magistrate or judge presiding at the hearing, rather than by means of written affidavits."[36] Again, that should have been the end of the matter. However, in the very next sentence, the Court wrote, "[t]he legislative history of Penal Code section 1538.5 supports the conclusion we reach."[37] The Court proceeded to examine that legislative history and concluded that, yes, the legislative history supports the meaning of the unambiguous language of the statute.[38]

The list could go on.[39] The reader may object that in these cases there was no harm, so no foul. After all, the Court did not use legislative history to change or override the plain

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[33] Section 1538.5(c)(2)(B).

[34] Section 1538.5(i).

[35] Section 1539.

[36] *Id*. at 726.

[37] *Id*. at 727.

[38] *Id*.

[39] *See, e.g., People v. Cole*, 38 Cal.4th 964, 988-90, 44 Cal.Rptr.3d 261 (2006) (Court considered legislative history even though it held that statutory language supported one party's reading and other party's reading was not equally plausible).

meaning; it simply used legislative history to "confirm" or "support" the plain meaning. The Court's opinions were longer than necessary, and the Court needlessly diverted its resources from other matters, and the Court ignored its own rules, but at least the Court was 110% sure that it interpreted the unambiguous statutes correctly.

However, the ultimate harm is that if legislative history can "confirm" an unambiguous statute, then logically it can create ambiguity too. That is precisely what occurred in *Smith v. Goff*.[40] In *Goff*, the executor of a will filed a petition to probate the will, and the public administrator filed objections.* The trial court denied the petition for probate.* The court of appeal reversed, and the Supreme Court reversed, affirming the trial court.* The issue was the meaning of Probate Code Section 6110(c).* That statute requires that any will, to be enforceable, must "be witnessed by being signed by at least two persons each of whom (1) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (2) understand that the instrument they sign is the testator's will."*

The will was signed by one person, and the other person was ready and willing to sign the will if permitted by the court.[41] Both of these persons were present at the same time when they witnessed the testator sign the will.[42] Further, they understood that the instrument they signed was the testator's will.[43] Thus, all the requirements in the statute's plain language were

[40] 38 Cal.4th 1045, 44 Cal.Rptr.3d 672 (2006).

[41] *Id*. at 1047-48.

[42] *Id*.

[43] *Id*.

apparently satisfied. Nevertheless, the Court held that the will was not enforceable, and would not be enforceable even if the second person were given permission to sign, because Section 6110(c) prohibits signatures after the testator died.[44]

At one point in its opinion, the Court conceded that the statute is unambiguous: "[p]lainly, section 6110(c) contains no express temporal limitation on when the witnesses must sign the will in order for the document to be valid."[45] Under the Court's rules of statutory construction, the Court should have concluded that, under the statute's plain meaning, the second witness' signature after the testator's death would make the will enforceable.

Instead, however, the next sentence of the Court's opinion was, "[t]hus, [Section 6110(c)] is ambiguous as to whether it permits postdeath attestation."[46] How did the Court turn the unambiguous absence of a temporal limitation into an ambiguity? By relying on the statute's legislative history, specifically on a prior version of the statute. **The Court noted that, before 1985, the witnesses had to sign in the presence of the testator (which logically precluded post-death signatures), and that Section 6110(c) replaced that prior statute.**[47] Indeed, in its opinion the Court did not even begin with Section 6110(c)'s text, but instead began with the legislative history, violating the rule that the Court is to "look first at the words themselves."[48] Overall, the Court's discussion of the legislative history of this statute spans pages 1048-1055 of

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[44] *Id*. at 1050-57.

[45] *Id*. at 1050.

[46] *Id*. at 1050.

[47] *Id*. at 1048.

[48] *Stephens*, 38 Cal.4th at 802.

the opinion. The Court held that "nothing in the language or legislative history of section 6110 indicates that by modifying the execution requirements [contained in prior law], the Legislature intended to permit postdeath attestation,"[49] so post-death signatures are prohibited.

Justice Moreno dissented, joined by Justice Werdegar. Justice Moreno wrote, "I fail to see how the circumstance that the statute does not limit when a witness may sign a will renders the statute ambiguous with respect to postdeath attestation."[50] Unfortunately, the answer to Justice Moreno's quandary is that the ambiguity was created by the unambiguous statute's legislative history.

It seems difficult to imagine a starker example of a court using legislative history to create an ambiguity and reach a result opposite to that required by the statute's unambiguous text. If the Court can use legislative history to find a temporal limitation on signatures when, admittedly, the statute's text plainly does not contain any such limitation, is there any practical limit on the use of legislative history?

B. The Court should change its behavior, or change the rule.

Obviously, this cannot continue. It is self-evidently indefensible for the Court continually to rely on legislative history no matter whether the statute is unambiguous, while asserting that the Court is prohibited from doing so. One of the three branches of California's government cannot be a blatant hypocrite. More important, as *Smith v. Goss* shows, the Court cannot be trusted to use legislative history only to "confirm" the meaning of unambiguous

[49] *Id*. at 1052-53.

[50] *Id*. at 1059 (Moreno, J., dissenting).

statutes, as opposed to using legislative history to create an ambiguity in the first place and therefore depart from the unambiguous text.

Thus, the Court must change something. Most conservatively, it could simply change its behavior to comply with the law. It can be careful to address legislative history if and only if the statute that it is interpreting is ambiguous. If the statute is unambiguous, then the Court would not rely on legislative history, whether to "confirm" the plain meaning or to depart from it.

Less conservatively, the Court could change the rules of statutory interpretation to bring them in line with the Court's practice. The Court could explicitly acknowledge that it typically relies on legislative history, whether or not the statute is ambiguous, and will continue to do so. Because there does not appear to be a principled basis to choose when, and when not, to rely on legislative history notwithstanding an unambiguous statute, the Court would most likely want to announce that it will always consider legislative history. Thus, the Court would acknowledge that, even if the language is unambiguous, the Court does not presume the Legislature meant what it said, and the plain meaning of the statute does not necessarily govern. The Court could then continue to use legislative history to (1) clarify an ambiguous statute, (2) confirm the meaning of an unambiguous statute, or (3) change the meaning of an unambiguous statute.

Whichever option the Court chooses, it should immediately stop breaking the rules that it announces.

V. Conclusion.

The California Supreme Court regularly violates its own important law of statutory interpretation that prohibits courts from relying on legislative history if the statute that they are interpreting is unambiguous. This article has recounted four cases in the Court's just-completed

Term in which the Court used legislative history to "confirm" a statute's unambiguous meaning, and one case in which the Court used legislative history to change a statute's unambiguous meaning. The article argues that it is self-evidently wrong for the Court continually to break its own rule, and suggests that the Court should either comply with the rule, or change the rule to conform to the Court's behavior.