S190646

COPY

IN THE SUPREME COURT OF CALIFORNIA

CALVIN LEONARD SHARP,
Petitioner,

v.

THE SUPERIOR COURT OF VENTURA COUNTY,
Respondent,

THE PEOPLE,
Real Party in Interest.

Ct. App. 2/6 B222025

Ventura County
Super. Ct. No. 2008014330

PETITION FOR REVIEW OF AN OPINION CERTIFIED FOR PUBLICATION

Presenting issues related to those before this Court in case S183961

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TO CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

On March 18, 2010, this court granted review of an order summarily denying petitioner's application for issuance of a writ of mandate and transferred the matter back to Court of Appeal with directions to issue an order to show cause. (S180075.)

The Court of Appeal has now filed an opinion, which it has certified for publication. (*Sharp v. Superior Court* (2011) 191 Cal.App.4th 1280; copy attached.)

The case remains worthy of review for the same reasons it did a year ago. Although the Legislature recently amended California's criminal discovery law to authorize an order directing a defendant to submit to a psychiatric evaluation by an expert retained by the prosecution, such an order remains barred where the psychiatric evaluation process is "specifically addressed by an existing provision of law." (Pen.

Code, §1054.3, subd. (b).) The Court of Appeal erred in concluding that the Legislature intended to amend California's scheme for the determination of sanity, which is specifically addressed by other existing provisions of the Penal Code that have worked well for decades.

This court should again grant review to settle important questions of law of immediate statewide importance arising from this recent amendment to California's criminal discovery scheme, which became operative on January 1, 2010. No other published opinion interprets the amendment and the case presents other important issues related to the compensation of such experts and the retrospective application of the amendment. This court has related issues before it in *Maldonado v. Superior Court* (S183961) which is now fully briefed. However, *Maldonado* will not provide a vehicle to resolve the issues presented here.

THE NATURE OF REVIEW

Review should be granted to determine whether the Court of Appeal erred:

- by concluding that a recent amendment to Penal Code section 1054.3 applies to the assessment of a defendant's sanity following the entry of a plea of not guilty by reason of insanity, despite the fact that procedures for such an assessment are specifically addressed by an existing provision of law; and,
- by concluding that the scope of defendant's partial waiver of Fifth Amendment rights can be expanded retrospectively by legislation enacted after the entry of his plea; and,
- by failing to find no abuse of discretion despite the fact the prosecution's discovery violation delayed the trial until the operative date of the very amendment they now seek to exploit.

PETITIONER'S CONTENTIONS

1. Penal Code section 1054.3, as amended effective January 1, 2010, does not alter the existing provisions of law regarding court-ordered examinations of criminal defendants in proceedings related to sanity.

2. Penal Code section 1027, subdivision (d), does not violate the separation-of-powers doctrine by imposing Judicial Branch control over Executive Branch spending.

3. The scope of the implied Fifth and Sixth Amendment waivers inherent in the entry of an NGRI plea is determined by the law in effect at the time of the waiver, and cannot be retrospectively broadened by legislation enacted after the plea was entered.[1]

4. The court abused its discretion by ordering an examination of the defendant by Dr. Mohandie after the prosecution withheld discovery and delayed the trial until after the operative date of the amendment.

THE NECESSITY FOR REVIEW

Review is necessary and important because the issues involve the construction of new legislation. the Legislature recently amended the criminal discovery statutes to provide: "*Unless otherwise specifically addressed by an existing provision of law*, whenever a defendant in a criminal action . . . places in issue his or her mental state at any phase of the criminal action . . . through the proposed testimony of any mental health expert, upon timely request by the prosecution, the court may order that the defendant . . . submit to examination by a prosecution-retained mental health expert."

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[1] Both the timing and scope of such waivers are the subject of extensive briefing in *Maldondo, supra.*

(§ 1054.3, subd. (b)(1), emphasis added.)

Introduction

In *Verdin v. Superior Court* (2008) 43 Cal.4th 1096 (*Verdin*), this court stayed and then reviewed an order directing a criminal defendant to grant access for purposes of a mental examination, not to a court-appointed mental health expert, but to an expert retained by the prosecution. The court held that "the trial court's order granting the prosecution access to petitioner for purposes of having a prosecution expert conduct a mental examination is a form of discovery that is not authorized by the criminal discovery statutes or any other statute, nor is it mandated by the United States Constitution. (*Id.*, at p. 1116.)

Verdin presented no issue involving proceedings following a plea of "not guilty by reason of insanity." The court expressed "no opinion" regarding cases "that involve a plea of not guilty by reason of insanity," noting that such cases are governed by the existing provisions of section 1027. (*Id.*, at p. 1107, fn. 4.)

After noting that the opinion did not purport to resolve "complicated" and "complex" constitutional questions, the court observed that the Legislature remained free to establish such a rule of discovery within constitutional limits. (*Id.*, at p. 1116, fn 9.)

The Legislature chose to do so by amending the criminal discovery statutes, specifically, section 1054.3, which specifies the information to be disclosed by the defendant to the prosecution.

Effective January 1, 2010, that section was amended by adding a new subdivision (b), which states:

> "(b) (1) *Unless otherwise specifically addressed by an existing provision of law,* whenever a defendant in a criminal action or a minor in a juvenile proceeding brought pursuant to a petition

alleging the juvenile to be within Section 602 of the Welfare and Institutions Code places in issue his or her mental state at any phase of the criminal action or juvenile proceeding through the proposed testimony of any mental health expert, upon timely request by the prosecution, the court may order that the defendant or juvenile submit to examination by a prosecution-retained mental health expert.

(A) The prosecution shall bear the cost of any such mental health expert's fees for examination and testimony at a criminal trial or juvenile court proceeding.

(B) The prosecuting attorney shall submit a list of tests proposed to be administered by the prosecution expert to the defendant in a criminal action or a minor in a juvenile proceeding. At the request of the defendant in a criminal action or a minor in a juvenile proceeding, a hearing shall be held to consider any objections raised to the proposed tests before any test is administered. Before ordering that the defendant submit to the examination, the trial court must make a threshold determination that the proposed tests bear some reasonable relation to the mental state placed in issue by the defendant in a criminal action or a minor in a juvenile proceeding. For the purposes of this subdivision, the term "tests" shall include any and all assessment techniques such as a clinical interview or a mental status examination.

(2) The purpose of this subdivision is to respond to *Verdin v. Superior Court* 43 Cal.4th 1096, which held that only the Legislature may authorize a court to order the appointment of a prosecution mental health expert when a defendant has placed his or her mental state at issue in a criminal case or juvenile proceeding pursuant to Section 602 of the Welfare and Institutions Code. Other than

> authorizing the court to order testing by prosecution-retained mental health experts in response to *Verdin v. Superior Court, supra*, it is not the intent of the Legislature to disturb, in any way, the remaining body of case law governing the procedural or substantive law that controls the administration of these tests or the admission of the results of these tests into evidence. (Emphasis added.)

Petitioner contends that the limitation "*Unless otherwise specifically addressed by an existing provision of law,*" refers to existing provisions of law, such as Title 6, Chap. 4, §1026, et seq. of the Penal Code, which addresses examinations into the sanity of the defendant following a plea of not guilty by reason of insanity.

As a response to the court's holding in *Verdin*, the amendment was not intended to amend or repeal by implication the state's scheme for litigation of the issue of sanity.

Subdivision (d) of section 1027 requires judicial approval of fees payable to expert witnesses called by the prosecution. It states that, "Nothing contained in this section shall be deemed or construed to prevent any party to any criminal action from producing any other expert evidence with respect to the mental status of the defendant; *where expert witnesses are called by the district attorney in such action, they shall only be entitled to such witness fees as may be allowed by the court.*"

In the instant case, the court ordered an examination by a prosecution-retained expert who has already been paid $32,000.00 by the District Attorney, without any judicial determination that such fees would be allowed by the court. Because this fact was known to the court, an order for an examination of the defendant by this witness was an abuse of discretion, assuming it was authorized at all. The prosecution and the trial court contend that this statute violates the separation-of-powers doctrine.

Finally, the petition in the Court of Appeal raised questions regarding the right to counsel and the problem of forcing the defendant to "stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's

absence might derogate from the accused's right to a fair trial." (*United States v. Wade* (1967) 388 U.S. 218, 226.)

Based upon the plain meaning of the amended statute, it does not change existing provisions of law regarding sanity.

Additional facts and conclusions

Because the Court of Appeal opinion remains factually inadequate after an extensive modification, petitioner also presents the following facts and conclusions:

- The District Attorney of Ventura County, acting in the name of the People, is prosecuting your petitioner Calvin Leonard Sharp for the August 12, 2007, special circumstances murder (§ 187(a)) of Sev'n Molina with a meat cleaver. The indictment also alleges the attempted premeditated murders (§ 664/187(a)) of Molina's mother, Sandra Ruiz, and a neighbor, Diana Cox, and the offenses of aggravated mayhem (§ 205) against the two surviving victims. In Count 6, the indictment alleges cruelty to an animal, in violation of section 597, subdivision (a).
- On March 17, 2009, the court accepted pleas of guilty to all of the offenses charged in the indictment (Exhibit A, pp. 1-3) coupled with a plea of not guilty by reason of insanity (NGRI) to all of the same counts.[2] Pursuant to section 1027, the

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[2] The Penal Code does not authorize or require such conflicting pleas. "A defendant who does *not* plead guilty may enter one or more of the other pleas." (§ 1016, emphasis added.) It appears that the trial court and counsel thought that these were the appropriate pleas to initiate a trial limited to sanity, while admitting the commission of the offenses charged. However, simple pleas of NGRI would have sufficed. (*Ibid.*) It is a distinction that makes no difference, however, as it puts this defendant in the same position as he would be following a verdict of guilty.

court selected and appointed qualified experts (Drs. Susan Ferrant and Christina Griffin) to examine the defendant regarding his mental state of sanity or insanity. (Exhibit G, at p. 88.) On March 24, 2009, the court appointed a third expert, Dr. Jablonski-Kaye, and vacated the appointment of Dr. Griffin. (*Ibid.*)

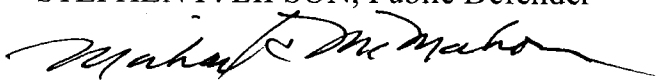
- On June 25, 2009, the court appointed a fourth expert, Dr. Randy Wood, who was designated and appointed by a stipulation from the prosecution and defense. (Exhibit G, at p. 92.) The prosecution considered requesting the appointment of Dr. Kris Mohandie, but "declined to make that motion," so that Dr. Mohandie would not be limited to accepting "ONLY court ordered fees," etc.) (Exhibit D, at p. 29; and §1027, subd. (d).)
- This petition for review seeks appellate review of an order pronounced on January 25, 2010, compelling petitioner Sharp to submit to custodial testimonial examination by a prosecution psychiatrist, Dr. Kris Mohandie. Although Dr. Mohandie was involved in the case *since the day of arrest*, the prosecution stipulated that they were in violation of the rules of discovery because they did not provide the defense with his report 30 days before trial. (Exhibit D, at pp. 44-45; Exhibit F, at p. 77.) On November 6, 2009, the court ordered Dr. Mohandie to provide his report, personal notes, correspondence, and testing materials to the defense on or before December 1, 2009. (Exhibit G, p. 112.) Such an order *requires* a finding that the prosecution has not complied with its duty to supply such reports at least 30 days prior to trial.
- The rationale behind the order on review is memorialized in the minutes of January 21, 2010. (Exhibit G, at pp. 113-117.) The trial court ostensibly made the order based upon a very recent amendment to Penal Code section 1054.3. If the order is not authorized by section 1054.3, the court has no inherent authority to order discovery in the form of a compelled psychiatric examination untethered to a statutory or constitutional base.
- Among other things, this petition contends that section 1054.3, as amended, does not apply to court-ordered examinations into the sanity of the defendant.

- This petition also challenges the order based upon other California law grounds and constitutional objections.
- The order on review is not directly appealable and petitioner has no plain and speedy remedy at law.
- Petitioner has supplied the court with an adequate record for appellate review, by lodging all of the pertinent records with the clerk of the Court of Appeal.
- Testimony about the examination has yet to be admitted at trial.
- The questions raised by this petition are matters of great public interest and will inevitably recur in other cases involving sanity. Once such an exam is ordered, the time for review on the merits is quite limited. For the guidance of courts in future cases presenting similar issues, this court should grant review and resolve the controversy.

The Prayer

The petition for review should be granted.

Respectfully submitted,
STEPHEN P. LIPSON, Public Defender



By: Michael C. McMahon
Chief Deputy Public Defender
Attorneys for Calvin Leonard Sharp

Discussion

I.

Because the selection and appointment of experts to examine a defendant upon a plea of not guilty by reason of insanity is "specifically addressed" by the existing provisions of Penal Code section 1027, section 1054.3 subdivision (b) does not apply.

Section 1054.3, subdivision (b)(1), as amended effective January 1, 2010, states:

> " *Unless otherwise specifically addressed by an existing provision of law*, whenever a defendant in a criminal action or a minor in a juvenile proceeding brought pursuant to a petition alleging the juvenile to be within Section 602 of the Welfare and Institutions Code places in issue his or her mental state at any phase of the criminal action or juvenile proceeding through the proposed testimony of any mental health expert, upon timely request by the prosecution, the court may order that the defendant or juvenile submit to examination by a prosecution-retained mental health expert." (Emphasis added.)

Because the selection and appointment of experts to examine a defendant upon a plea of not guilty by reason of insanity is "specifically addressed" by the existing provisions of Penal Code section 1027, section 1054.3 subdivision (b) does not apply.

This conclusion is consistent with the stated purpose of the amendment. Subdivision (b) contains an express statement of the legislative intent underlying the amendment. Subdivision (b)(2) states that, "The purpose of this subdivision is to respond to *Verdin v. Superior Court* 43 Cal.4th 1096, which held that only the Legislature may authorize a court to order the appointment of a prosecution mental health expert when a defendant has placed his or her mental state at issue in a criminal case or juvenile proceeding pursuant to Section 602 of the Welfare and Institutions Code."

Verdin v. Superior Court (2008) 43 Cal.4th 1096, presented no issue involving proceedings following a plea of "not guilty by reason of insanity." The court expressed "no opinion" regarding cases "that involve a plea of not guilty by reason of insanity," noting that such cases are governed by the existing provisions of section 1027. (*Id.*, at p. 1107, fn. 4.) Subdivision (b)(2) goes on to say that, "Other than authorizing the court to order testing by prosecution-retained mental health experts in response to *Verdin v. Superior Court, supra,* it is not the intent of the Legislature to disturb, in any way, the remaining body of case law governing the procedural or substantive law that controls the administration of these tests or the admission of the results of these tests into evidence."

Petitioner's research discloses no California judicial opinion discussing the statutory language at issue here, that is: "Unless otherwise specifically addressed by an existing provision of law." The Court of Appeal also found none.

When broad application of a statute is intended, the section often begins, "Notwithstanding any other provision of law,...." For example, section 3003.5, a statute setting forth restrictions on where certain sex offenders subject to the lifetime registration requirement of section 290 may reside, includes that language. Health & Safety Code, section 11362.5, does as well, to provide physicians immunity for recommending marijuana to a patient for medical purposes. The new amendment to section 1054.3 could have stated that it applied "notwithstanding any other provision of law."

But here, the Legislature included specific limiting language to leave unchanged all situations specifically addressed by an existing provision of law. Effect must be given to that unusual limitation.

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II.

Section 1027, and section 1054.3, subdivision (b), are not statutes in *pari materia*, because the latter expressly does not apply when its otherwise applicable procedures are specifically addressed by an existing provision of law.

Because the amendment does not purport to modify or repeal the procedures spelled out in section 1027, the doctrine of construing statutes in *pari materia* does not apply.

Section 1027 could have been amended to allow for the appointment of a qualified mental health expert *selected and paid* by the prosecution. Clearly, the Legislature chose not to do so, and amendments by implication are disfavored. (*Cacho v. Boudreau* (2007) 40 Cal.4th 341, 352.)

Section 1054.3, subdivision (b), was merely written to respond to the situation presented in *Verdin*: when a defendant presents a mental defense at the guilt or penalty phase of a criminal trial, and no "*existing provision of law*" allows for the appointment of an expert to review and respond to the testimony of a defense expert.

III.

The fee restrictions established by section 1027, subdivision (d), do not violate the separation-of-powers doctrine, and the court abused its discretion by ordering petitioner to submit to examination by Dr. Mohandie, because the prosecution has already paid him $32,000 in unauthorized fees.

Section 1027, subdivision (d), provides that, "Nothing contained in this section shall be deemed or construed to prevent any party to any criminal action from producing any other expert evidence with respect to the mental status of the defendant; *where expert witnesses are called by the district attorney in such action, they shall only be entitled to such witness fees as may be allowed by the court.*" (Emphasis added.)

The order for an examination of the defendant by Dr. Mohandie constitutes an abuse of discretion because the prosecution is paying him fees of more than $32,000. (Exhibit F, at page 76: 15-16.) Subdivision (d) prohibits the district attorney from tainting the search for the truth by paying their retained experts on sanity more than the fees allowed by the court. The fee restrictions provided in this subdivision are not limited to fees paid to experts appointed by the court, but applies to all expert witnesses called by the district attorney on the question of sanity.

The prosecution is well aware of the fee restrictions because they declined to move for the appointment of Dr. Mohandie so that Mohandie would not be limited to accepting "ONLY court ordered fees, etc.) (Exhibit D, at p. 29; and §1027, subd. (d).)

This was a blatant attempt to violate the fee restrictions, which applies to all experts called by the district attorney on the issue of sanity.

As he previously asserted in this court (Answer to Petition for Review in S180075, at pp. 6-8), and in his briefing on the order to show cause, the district attorney argues that the fee restrictions established by section 1027, subdivision (d), violate the separation-of-powers doctrine if the restrictions apply to all experts called by the prosecution. Sharp disagrees, and the Court of Appeal simply failed to resolve this important issue. "The power of the legislature to regulate criminal and civil proceedings and appeals is undisputed." (*People v. Engram* (2010) 50 Cal.4th 1131, 1147, quoting *Brydonjack v. State Bar* (1929) 208 Cal. 439.) The trial court erred in concluding that compliance with the plain meaning of the fee-restriction statute would "raise separation of powers issues." (RT, 2/10/2010 at p. 30, lines 6-9.)[3]

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[3] Dr. Mohandie's pre-examination reports on the defendant's sanity were admitted into evidence by stipulation on January 12, 2010. (Ex. G, pp. 111-112)

IV.

The court abused its discretion because Dr. Mohandie was a central figure in a discovery violation in this same case and the order gives the offending party a "windfall" for their misconduct.

The Court of Appeal opinion states that, "The record includes a court order requiring Dr. Mohandie to file a report, but there is nothing in the record establishing discovery abuse, or showing other conduct that would be material to the exercise of the trial court's discretion in making the January 25, 2010, order."

This grossly misstates the record. Obviously, the court's only authority to order Dr. Mohandie to file a report is based upon a finding "that a party [the prosecution] has not complied with section 1054.1" by failing, without good cause, to furnish the defense with a copy of the report at least 30 days prior to trial as required by section 1054.7. Absent a finding of unilateral discovery abuse, the court lacks jurisdiction to order Dr. Mohandie to do anything. On this, the law is clear. (See § 1054.5.)

Here, Dr. Mohandie's violation of the discovery statutes by refusing to furnish his report in a timely manner delayed the trial until the operative date of the discovery amendment the prosecution now seeks to exploit. The defense asked in limine to exclude any testimony on sanity from Dr. Mohandie because of the discovery violation. Instead, the trial court rewarded the prosecution's violation by ordering the defendant to submit to an examination by the same scofflaw who refused to write an expert report despite numerous demands that he do so. This was an abuse of discretion, and the showing made in support of the motion was insufficient. The motion was untimely and the People are guilty of laches because they originally requested the court to appoint Dr. Wood, rather than Dr. Mohandie. Under the facts of this case, the court abused its discretion because the motion was made mid-trial and will force an unreasonably long delay, and additional expense to the defense.

For Fifth Amendment reasons, California has excluded statements of a defendant to a psychiatrist appointed by the court. (See, *People v. Lines* (1975) 13 Cal.3d 500, 516 ["reappointment" for section 1027 examination]).

"The accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." (citation omitted.) *United States v. Wade* (1967) 388 U.S. 218, 226.) In *United States v. Wade*, the Supreme Court determined that a defendant had a Sixth Amendment right to assistance of counsel at a police lineup conducted to elicit identification evidence. The court noted that the presence of counsel was required "to protect Wade's most basic right as a criminal defendant – his right to a fair trial at which the witnesses against him might be meaningfully cross-examined." The Court observed that a lineup was an inherently suggestive procedure and that a defendant would be unable to perceive the suggestive or distorting influences and reconstruct them at trial.

The mentally impaired defendant is in custody on this case. The proposed "examination" is, effectively, a custodial interrogation by a highly-paid, highly-trained member of the prosecution team. Nevertheless, nothing in the amended statute or the order on review imposes the type of "constitutional limits" envisioned by this court in *Verdin*. (*Verdin*, at p. 1116, fn. 9.)

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V.

While it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state some means to rebut that testimony, section 1027 is sufficient to protect the rights of the People. The United State Supreme Court has never ruled that the prosecution has a right to an examination by a prosecution-retained expert, or to use in evidence statements the defendant made about the crimes with which he was charged.

In *Estelle v. Smith* (1981) 451 U.S. 454 (*Smith*), the United States Supreme Court held that the penalty phase admission of testimony from a psychiatrist who examined the defendant to determine his competence to stand trial violated his Fifth Amendment privilege against compelled self-incrimination because he was not advised prior to the psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at sentencing proceedings. (*Id.*, at 461-69.)

In *Smith,* the court did not decide any issues regarding prosecution examinations in sanity trials, but noted that some Circuit courts had done so and, in dicta, suggested that the State might be entitled to some effective means of controverting defense evidence on an issue that the defense has interjected into the case. (*Id.*, at p. 465.) In California, section 1027 provides an effective means of controverting defense evidence through the appointment of independent experts. *Smith* does not control here.

In *Buchanan v. Kentucky* (1987) 483 U.S. 402, the Court held that if a defendant requests a psychiatric examination in order to prove a mental-status defense, he waives the right to raise a Fifth Amendment challenge to the prosecution's use of evidence obtained through *that* examination to rebut the defense. (*Id.*, at pp. 422-423; see also *Powell v. Texas* (1989) 492 U.S. 680, 683-84.) *Buchanan* does not control here.

California's existing statutory provisions for the litigation of sanity adequately protect the rights of the prosecution. Nothing in section 1054.3 purports to modify or amend the existing provisions of law regarding sanity.

Similarly, nothing in *People v. McPeters* (1992) 2 Cal.4th 1148, authorizes an examination by a prosecution-retained expert on the issue of sanity. In that case, the court was concerned about an "unfair tactical advantage to defendants, who could, with impunity, present mental defenses at the penalty phase, secure in the assurance they could not be rebutted by expert testimony based on an actual psychiatric examination." (*Id.*, at p. 1190) Here, the existing provisions of section 1027 ensure that defense evidence may be rebutted by expert testimony based upon multiple psychiatric examinations.

The Court of Appeal did not adequately address the complex constitutional issues presented by the petition.

Conclusion

The petition raises important issues of law of immediate statewide importance and the court should grant review.

Dated: February 15, 2011.

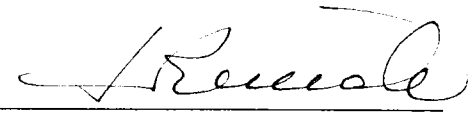
Respectfully Submitted,
STEPHEN P. LIPSON, Public Defender

By Michael C. McMahon, Chief Deputy
State Bar Certified Specialist – Appellate Law
State Bar Certified Specialist – Criminal Law
SBN 71909
Attorney for Petitioner

CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that by utilization of MSWord 2007 Word Count feature there are less than 6000 words in Times New Roman 13 pt. font in this document, excluding Declaration of Service.

Dated this 15th day February, 2011.



Jeane Renick
Legal Mgmt Asst. III

LEXSEE 2011 CAL. APP. LEXIS 43

CALVIN LEONARD SHARP, Petitioner, v. THE SUPERIOR COURT OF VENTURA COUNTY, Respondent; THE PEOPLE, Real Party in Interest.

No. B222025

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

191 Cal. App. 4th 1280*; *2011 Cal. App. LEXIS 43

January 18, 2011, Filed

NOTICE:

As modified Feb. 2, 2011.

SUBSEQUENT HISTORY: Modified and rehearing denied by *Sharp v. Superior Court, 2011 Cal. App. LEXIS 125 (Cal. App. 2d Dist., Feb. 2, 2011)*

PRIOR HISTORY: [1]**

Superior Court of Ventura County, No. 2008014330, Kevin G. DeNoce, Judge.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Defendant was indicted for murder in the course of burglary and mayhem, two counts of attempted murder resulting in the infliction of great bodily injury, and other offenses. He pleaded not guilty to the offenses and not guilty by reason of insanity (NGRI). The trial court granted the People's motion for a mental examination by a prosecution-retained expert pursuant to *Pen. Code, § 1054.3, subd. (b)(1)*. (Superior Court of Ventura County, No. 2008014330, Kevin G. DeNoce, Judge.)

The Court of Appeal denied defendant's petition for a writ of mandate directing the trial court to vacate its order granting the People's motion for a mental examination by a prosecution-retained expert. The court held that *Pen. Code, § 1054.3, subd. (b)*, applies to determinations of sanity under Pen. Code, § 1027. Accordingly, *§ 1054.3, subd. (b)(1)*, authorizes a trial court to order a mental examination by a retained prosecution expert of a defendant who pleads NGRI. Although defendant's waiver of constitutional rights was only to the extent ne-

cessary to permit useful mental examinations, *§ 1054.3, subd. (b)*, and the trial court's order expressly and implicitly included reasonable safeguards. *Section 1054.3, subd. (b)*, relates to the procedures to be followed in the conduct of a sanity trial. Its application in defendant's case was prospective and permissible. The record before the court was insufficient for it to make any determination regarding the propriety of witness fees that had or might be paid to a mental health expert retained by the prosecution, much less a determination of whether the trial court abused its discretion in that regard. (Opinion by Perren, J., with Gilbert, P. J., and Coffee, J., concurring.) **[*1281]**

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Criminal Law § 162--Plea--Not Guilty by Reason of Insanity--Discovery--Examination by Prosecution-retained Mental Health Expert.--The trial court's authority to order a mental health examination by an expert retained by the prosecution is not specifically addressed by *Pen. Code, § 1027*. Accordingly, *Pen. Code, § 1054.3, subd. (b)*, authorizes a trial court to order a defendant who pleads not guilty by reason of insanity (NGRI) to submit to a psychiatric examination by a prosecution-retained expert. Thus, the trial court did not err in the case of a defendant who pleaded not guilty to the offenses and NGRI in granting the People's motion for a mental examination by a prosecution-retained expert pursuant to *§ 1054.3, subd. (b)(1)*.

[*Erwin et al., Cal. Criminal Defense Practice (2010) ch. 86, § 86.02.*]

(2) Criminal Law § 162--Plea--Not Guilty by Reason of Insanity--Discovery--Examination by Prosecution-retained Mental Health Expert.--*Pen. Code, § 1054.3, subd. (b)*, authorizes a trial court to order a defendant to submit to examination by a prosecution-retained mental health expert whenever a defendant places in issue his or her mental state at any phase of the criminal action. *Pen. Code, § 1027*, provides for the appointment of mental health experts to conduct mental examinations of a defendant who pleads not guilty by reason of insanity (NGRI), describes the content of written reports by the appointed experts, and obligates the experts if summoned to testify at the sanity trial. *Section 1027* does not permit, prohibit, or expressly consider the matter of mental health examinations by a prosecution-retained mental health expert. But, *§ 1027* does permit the introduction of other evidence of a defendant's mental status, indicating that the procedures expressly provided in *§ 1027* are not intended to be the exclusive source of evidence in a sanity determination (*§ 1027, subd. (d)*). Application of *Pen. Code, § 1054.3, subd. (b)*, to cases in which an NGRI plea has been entered advances the intent of *§ 1054.3, subd. (b)*, and is fully consistent with the language and purpose of *Pen. Code, § 1027*.

(3) Statutes § 21--Construction--Legislative Intent--Language--Ambiguity.--Under the rules governing statutory interpretation, the fundamental objective is to ascertain and effectuate legislative intent. If the words of

a statute given their usual and ordinary meaning are clear and unambiguous, there is no further need for interpretation. If the statutory language is ambiguous, courts must adopt a construction of those words that best harmonizes the statute internally and with other related statutes. In so doing, courts consider the objective of the statute, its legislative history, public policy, and the entire statutory scheme. **[*1282]**

(4) Criminal Law § 162--Plea--Not Guilty by Reason of Insanity--Discovery--Examination by Prosecution-retained Mental Health Expert.--The Legislature enacted *Pen. Code, § 1054.3, subd. (b)*, to provide express statutory authorization for court-ordered mental examinations by prosecution experts. The statute states that the purpose of *§ 1054.3, subd. (b)*, is to respond to *Verdin v. Superior Court*, which held that only the Legislature may authorize a court to order the appointment of a prosecution mental health expert when a defendant places his or her mental state at issue. The legislative history of *§ 1054.3, subd. (b)*, further indicates that the Legislature intended to restore the reciprocity principle of the criminal discovery law regarding compelled mental examinations. Application of *§ 1054.3, subd. (b)*, to cases involving pleas of not guilty by reason of insanity (NGRI) furthers the legislative purpose of extending reciprocity to the prosecution in the area of mental examinations. To exclude defendants who plead NGRI from the reciprocity created by *§ 1054.3, subd. (b)*, would unnecessarily limit the intent of the statute, as well as the purpose of Prop. 115.

(5) Criminal Law § 162--Plea--Not Guilty by Reason of Insanity--Court-appointed Experts.--The object of a procedure focusing on court-appointed experts is to remove the possible bias which may influence the employment of experts by the parties to the action. The appointed experts are agents of the court, not of the parties or their attorneys. *Pen. Code, § 1027*, however, does not purport to cover the entire range of actions that may be necessary to assure that the determination of sanity will advance the truth-seeking function of a trial. The statute acknowledges that experts appointed pursuant to its terms are not to be the exclusive source of testimony regarding a defendant's mental condition, and contemplates that the parties will retain their own experts and call those experts as witnesses. *Section 1027* is not part of the criminal discovery law and predates Prop. 115 by several decades. The criminal discovery law exists alongside *§ 1027*, and *§ 1027, subd. (d)*, strongly suggests that evidence obtained under the authority of the California discovery law is admissible in sanity trials. Allowing the parties to utilize their own experts to argue the sanity of a defendant conforms to the adversarial truth-finding process of the criminal justice system, and the goal of the discovery law. It permits the prosecution experts to challenge the defense expert's professional qualifications and reputation, as well as his or her perceptions and thoroughness of preparation.

(6) Criminal Law § 162--Plea--Not Guilty by Reason of Insanity--Mental Examinations--Waiver of Constitutional Rights.--A defendant who pleads not guilty by reason of insanity waives his or her *Fifth* and *Sixth Amendment* rights to the extent

deemed necessary to permit useful sanity examinations by defense and prosecution mental health **[*1283]** experts. A plea of insanity is a tactical voluntary decision made by a defendant with the advice of counsel, and mental examinations flowing from the plea are not deemed to be compelled.

(7) Criminal Law § 207--Trial--Proceedings on Issue of Insanity--Discovery--Examination by Prosecution-retained Mental Health Expert--Procedure.--*Pen. Code, § 1054.3, subd. (b)*, requires the People to submit a list of tests proposed to be administered by the prosecution expert to the defendant in a criminal action. At the request of the defendant in a criminal action, a hearing shall be held to consider any objections raised to the proposed tests before any test is administered. Before ordering that the defendant submit to the examination, the trial court must make a threshold determination that the proposed tests bear some reasonable relation to the mental state placed in issue by the defendant in a criminal action or a minor in a juvenile proceeding.

(8) Statutes § 4--Prospective Operation and Effect--Penal Laws.--It is presumed that criminal statutes apply prospectively.

(9) Statutes § 5--Retroactive Operation and Effect--Penal Laws.--A statute is retrospective if it defines conduct occurring prior to its effective date as criminal, increases the punishment for such conduct, or eliminates a defense to a criminal charge based on the conduct. Conversely, application of a statute affecting the conduct of a trial that has not yet occurred is not deemed to be retroactive, even if the trial pertains to conduct that occurred prior to the statute's enactment. The effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future.

(10) Criminal Law § 162--Plea--Not Guilty by Reason of Insanity--Separate Hearings--Burden of Proof.--There is only one trial in a case involving a defense that the defendant is not guilty by reason of insanity. The fact that the sanity phase of the trial is conducted in a separate proceeding and that the defendant bears the burden of proof does not convert it into a separate criminal action.

(11) Criminal Law § 199--Trial--Commencement--Jury Selection.--Trial may be deemed to commence when jury selection begins for purposes of a particular statute or public policy.

(12) Criminal Law § 162--Plea--Not Guilty by Reason of Insanity--Prosecution's Expert Witnesses--Fees.--*Pen. Code, § 1027, subd. (d)*, provides that nothing contained in this section shall be deemed or construed to prevent any party to any criminal action from producing **[*1284]** any other expert evidence with respect to the mental status of the defendant; where expert witnesses are called by the district attorney in such action, they shall only be entitled to such witness fees as may be allowed by the court. The language of the statute gives the trial court discretion to determine the propriety of the prosecution's expert witness fees. Nothing in *§ 1027, subd. (d)*, establishes any particular monetary "fee cap."

The statute provides only that an expert witness who is called by the district attorney at trial is limited to fees allowed by the court.

COUNSEL: Stephen P. Lipson, Public Defender, and Michael C. McMahon, Chief Deputy Public Defender, for Petitioner.

No appearance for Respondent.

Gregory D. Totten, District Attorney, and Lisa O. Lyytikainen, Deputy District Attorney, for Real Party in Interest.

JUDGES: Opinion by Perren, J., with Gilbert, P. J., and Coffee, J., concurring.

OPINION BY: Perren

OPINION

PERREN, J.--In *Verdin v. Superior Court (2008) 43 Cal.4th 1096 [77 Cal. Rptr. 3d 287, 183 P.3d 1250]* (*Verdin*), our Supreme Court held that the prosecution had no right to compel a mental examination of a defendant by a retained prosecution expert because such an examination is a form of discovery that is not authorized by statute or mandated by the Constitution. Here, we hold that a 2010 amendment to the California discovery law authorizes such a mental examination of a defendant who pleads not guilty by reason of insanity (NGRI). (*Pen. Code,* [1] *§ 1054.3, subd. (b)*; see also *§ 1027.*)

1 All statutory references are to the Penal Code unless otherwise stated.

Calvin Leonard Sharp petitions this court for a writ of mandate directing the superior court to vacate its order of January 25, 2010, granting the People's motion for a mental examination by a prosecution-retained **[**2]** expert. The People's motion was granted by the trial court pursuant to *section 1054.3, subdivision (b)*, a provision in the California discovery law which became effective on January 1, 2010 (*section 1054.3(b)*). [2] We issued an alternative writ and real party in interest filed a return.

2 *Section 1054.3(b)* provides in its entirety: "(1) Unless otherwise specifically addressed by an existing provision of law, whenever a defendant in a criminal action or a minor in a juvenile proceeding brought pursuant to a petition alleging the juvenile to be within Section 602 of the Welfare and Institutions Code places in issue his or her mental state at any phase of the criminal action or juvenile proceeding through the proposed testimony of any mental health expert, upon timely request by the prosecution, the court may order that the defendant or juvenile submit to examination by a prosecution-retained mental health expert. "(A) The prosecution shall bear the cost of any such mental health expert's fees for examination and testimony at a criminal trial or juvenile court proceeding. "(B) The prosecuting attorney shall submit a list of tests proposed to be administered by the prosecution expert to the **[**3]** defendant in a criminal action or a minor in a juvenile proceeding. At the request of the defendant in a criminal action or a minor in a juvenile proceeding, a hearing shall be held to consider any

objections raised to the proposed tests before any test is administered. Before ordering that the defendant submit to the examination, the trial court must make a threshold determination that the proposed tests bear some reasonable relation to the mental state placed in issue by the defendant in a criminal action or a minor in a juvenile proceeding. For the purposes of this subdivision, the term 'tests' shall include any and all assessment techniques such as a clinical interview or a mental status examination. "(2) The purpose of this subdivision is to respond to *Verdin v. Superior Court[, supra,] 43 Cal.4th 1096*, which held that only the Legislature may authorize a court to order the appointment of a prosecution mental health expert when a defendant has placed his or her mental state at issue in a criminal case or juvenile proceeding pursuant to *Section 602 of the Welfare and Institutions Code*. Other than authorizing the court to order testing by prosecution-retained mental health experts in response **[**4]** to *Verdin v. Superior Court, supra*, it is not the intent of the Legislature to disturb, in any way, the remaining body of case law governing the procedural or substantive law that controls the administration of these tests or the admission of the results of these tests into evidence."

[*1285]

Sharp contends that *section 1054.3(b)* does not apply to a determination of sanity, and that the trial court has no other authority to compel a mental examination by a prosecution-retained expert in a case where the defendant pleads NGRI. (*§ 1027.*) Sharp also claims *section 1054.3(b)* was improperly applied retrospectively, the trial court violated his constitutional rights under the *Fifth* and *Sixth Amendments* and the *due process clause*, and the court abused its discretion. We conclude that *section 1054.3(b)* applies to determinations of sanity under *section 1027* and that Sharp's other contentions have no merit. Accordingly, we deny the writ.

FACTS AND PROCEDURAL HISTORY

In April 2008, Sharp was indicted for murder in the course of burglary and mayhem, two counts of attempted murder resulting in the infliction of great bodily injury, and other offenses. The offenses occurred in August 2007.

In March 2009, Sharp **[**5]** pleaded not guilty to the offenses and NGRI. Pursuant to *section 1027*, the trial court appointed two mental health experts, Drs. Susan Ferrant and Christina Griffin, to examine Sharp for the purpose of evaluating his sanity. Shortly thereafter, the court appointed Dr. Denise Jablonski-Kaye to replace Dr. Griffin. In June 2009, the court appointed Dr. Randy Wood pursuant to stipulation by the prosecution and defense. **[*1286]**

In November 2009, Sharp withdrew his not guilty plea to the offenses, but the NGRI plea remained. [3] He waived his right to a jury trial on the issue of sanity.

3 A defendant who pleads NGRI thereby admits commission of the offenses. (*§ 1016.*)

In January 2010, the People filed a motion to compel Sharp to submit to a mental

examination by Dr. Kris Mohandie, a mental health expert previously retained by the prosecution. The motion requested permission to administer certain enumerated tests and procedures, namely "The MMPI-2, the Structured Interview of Reported Symptoms and a clinical interview."

On January 25, 2010, the trial court granted the People's motion (January 25, 2010, order). The court ruled that *section 1054.3(b)* applied to a determination of sanity after a plea of **[**6]** NGRI. The court also concluded that the People's motion was timely and did not violate Sharp's constitutional rights.

Sharp filed a petition for writ of mandate challenging the January 25, 2010, order which we denied without a hearing. Sharp filed a petition for review with the California Supreme Court. The Supreme Court granted review and transferred the case to this court with instructions to vacate our order denying Sharp's petition and direct the superior court to show cause why the writ should not be granted.

DISCUSSION

Construction and Application of Section 1054.3(b)

Section 1054.3(b) provides in part that "[*u*]*nless otherwise specifically addressed by an existing provision of law*, whenever a defendant in a criminal action ... places in issue his or her mental state at any phase of the criminal action ... through the proposed testimony of any mental health expert, upon timely request by the prosecution, the court may order that the defendant ... submit to examination by a prosecution-retained mental health expert." (Italics added.) The central issue on this appeal is whether the subject of court-ordered mental examinations by prosecution experts is "otherwise specifically addressed **[**7]** by" *section 1027* which establishes a procedure for the appointment of mental health experts in insanity cases.

(1) We conclude that the trial court's authority to order a mental health examination by an expert retained by the prosecution is not "specifically addressed" by *section 1027*. Accordingly, *section 1054.3(b)* authorizes a trial court to order a defendant who pleads NGRI to submit to a psychiatric examination by a prosecution-retained expert. **[*1287]**

(2) *Section 1054.3(b)* authorizes a trial court to order a defendant to "submit to examination by a prosecution-retained mental health expert" whenever a defendant "places in issue his or her mental state at any phase of the criminal action." (*§ 1054.3, subd. (b)(1).*) *Section 1027* provides for the appointment of mental health experts to conduct mental examinations of a defendant who pleads NGRI, describes the content of written reports by the appointed experts, and obligates the experts if summoned to testify at the sanity trial. *Section 1027* does not permit, prohibit, or expressly consider the matter of mental health examinations by a "prosecution-retained mental health expert." But, *section 1027* does permit the introduction of other evidence of **[**8]** a defendant's mental status, indicating that the procedures expressly provided in *section 1027* are not intended to be the exclusive source of evidence in a sanity determination. (*§ 1027, subd. (d).*) As we shall **[*1288]** explain, application of *section 1054.3(b)* to cases in which an NGRI plea has been entered advances the

intent of *section 1054.3(b)*, and is fully consistent with the language and purpose of *section 1027*.

4 *Section 1027* provides in its entirety: "(a) When a defendant pleads not guilty by reason of insanity the court must select and appoint two, and may select and appoint three, psychiatrists, or licensed psychologists who have a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders, to examine the defendant and investigate his mental status. It is the duty of the psychiatrists or psychologists so selected and appointed to make the examination and investigation, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question. The psychiatrists or psychologists so appointed by the court shall be allowed, in addition to their actual traveling expenses, **[**9]** such fees as in the discretion of the court seems just and reasonable, having regard to the services rendered by the witnesses. The fees allowed shall be paid by the county where the indictment was found or in which the defendant was held for trial. "(b) Any report on the examination and investigation made pursuant to subdivision (a) shall include, but not be limited to, the psychological history of the defendant, the facts surrounding the commission of the acts forming the basis for the present charge used by the psychiatrist or psychologist in making his examination of the defendant, and the present psychological or psychiatric symptoms of the defendant, if any. "(c) This section does not presume that a psychiatrist or psychologist can determine whether a defendant was sane or insane at the time of the alleged offense. This section does not limit a court's discretion to admit or exclude, pursuant to the Evidence Code, psychiatric or psychological evidence about the defendant's state of mind or mental or emotional condition at the time of the alleged offense. "(d) Nothing contained in this section shall be deemed or construed to prevent any party to any criminal action from producing any **[**10]** other expert evidence with respect to the mental status of the defendant; where expert witnesses are called by the district attorney in such action, they shall only be entitled to such witness fees as may be allowed by the court. "(e) Any psychiatrist or psychologist so appointed by the court may be called by either party to the action or by the court itself and when so called shall be subject to all legal objections as to competency and bias and as to qualifications as an expert. When called by the court, or by either party, to the action, the court may examine the psychiatrist, or psychologist as deemed necessary, but either party shall have the same right to object to the questions asked by the court and the evidence adduced as though the psychiatrist or psychologist were a witness for the adverse party. When the psychiatrist or psychologist is called and examined by the court the parties may

> cross-examine him in the order directed by the court. When called by either party to the action the adverse party may examine him the same as in the case of any other witness called by such party."

(3) The rules governing statutory interpretation are well established. The fundamental objective is **[**11]** to ascertain and effectuate legislative intent. (*People v. Trevino (2001) 26 Cal.4th 237, 240 [109 Cal. Rptr. 2d 567, 27 P.3d 283].*) If the words of a statute given their usual and ordinary meaning are clear and unambiguous, there is no further need for interpretation. (*Id. at p. 241*; *People v. Woodhead (1987) 43 Cal.3d 1002, 1007 [239 Cal. Rptr. 656, 741 P.2d 154].*) If the statutory language is ambiguous, courts must adopt a construction of those words that best harmonizes the statute internally and with other related statutes. (*People v. Ferrer (2010) 184 Cal.App.4th 873, 880 [108 Cal. Rptr. 3d 908].*) In so doing, courts consider the objective of the statute, its legislative history, public policy, and the entire statutory scheme. (*People v. Beaver (2010) 186 Cal.App.4th 107, 117 [111 Cal. Rptr. 3d 726].*)

The phrase "[u]nless otherwise specifically addressed by an existing provision of law" in *section 1054.3(b)* is ambiguous. The verb "addressed" is vague and imprecise and commonly used only in informal conversation. "Address" means no more than to "direct the efforts or turn the attention" to something. (Webster's 3d New Internat. Dict. (1981) p. 24.)

In addition, use of the word "addressed" is a rarity in legislative enactments. A phrase such as "except as otherwise *provided* by law" is common, but both **[**12]** the parties and our independent research have failed to discover any other statute that uses the word "addressed" in place of "provided." Modifying the word "addressed" with "specifically" may narrow its ambit but does not remove the ambiguity. The term "specifically addressed" becomes reasonably clear and precise only if we interpret the term as having the same meaning as "specifically *provided*." Therefore, we construe the *section 1054.3(b)* phrase as having the same legal effect as "[u]nless otherwise specifically *provided* by an existing provision of law."

This interpretation of the *section 1054.3(b)* phrase compels the conclusion that the statute applies to cases where a defendant pleads NGRI. The subject of certain mental examinations is "specifically provided" in *section 1027*, but the subject of court-ordered examinations by prosecution experts is not mentioned at all. Moreover, *section 1027* includes no express limitation on mental examinations and expressly provides for the admission of mental health evidence other than the testimony and reports of appointed experts. (*§ 1027, subd. (d).*)

Our construction is supported by the history of *section 1054.3(b)* and the fundamental purpose **[**13]** of California's criminal discovery law. The discovery **[*1289]** law underwent major changes in 1990 when the electorate approved Proposition 115, The Crime Victims Justice Reform Act. (*§ 1054 et seq.*) As relevant here, Proposition 115 enacted a statutory scheme "to reopen the two-way street of reciprocal discovery." (*Izazaga v. Superior Court (1991) 54 Cal.3d 356, 372 [285 Cal. Rptr. 231, 815 P.2d 304].*) "In order to ac-

complish this goal, the voters intended to remove the roadblock to prosecutorial discovery created by our interpretations of the state constitutional privilege against self-incrimination as developed in [certain prior] cases." (*Ibid.*) As stated in Proposition 115, the People "find that it is necessary to reform the law as developed in numerous California Supreme Court decisions and as set forth in the statutes of this state. These decisions and statutes have unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution, thereby unnecessarily adding to the costs of criminal cases, and diverting the judicial process from its function as a quest for truth." (Ballot Pamp., Primary Elec. (June 5, 1990) text of Prop. 115, § 1, subd. (b), p. 33.)

In *Verdin*, the Supreme Court **[**14]** considered "whether a trial court may order ... a criminal defendant, to grant access for purposes of a mental examination, not to a court-appointed mental health expert, but to an expert retained by the prosecution." (*Verdin, supra, 43 Cal.4th at p. 1100.*) *Verdin* concluded that a trial court cannot issue such an order. (*Ibid.*)

The Supreme Court's holding rested on three elements. First, the court reasoned that a mental examination constitutes "discovery," within the meaning of the *section 1054* criminal discovery statute. (*Verdin, supra, 43 Cal.4th at p. 1105.*) Second, the court observed that, under *section 1054, subdivision (e)*, " 'no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.' " (*43 Cal.4th at pp. 1103, 1105.*) Third, nothing in California's criminal discovery law, any other statute, or the United States Constitution authorizes a compelled mental examination of a criminal defendant by an expert retained by the prosecution. (*43 Cal.4th at p. 1116.*)

Verdin disapproved several earlier cases holding that a trial court may order a defendant who has placed his mental state at issue to undergo a **[**15]** mental examination conducted by an expert retained by the prosecution. (*Verdin v. Superior Court, supra, 43 Cal.4th at pp. 1106-1107*, citing *People v. McPeters (1992) 2 Cal.4th 1148 [9 Cal. Rptr. 2d 834, 832 P.2d 146]*; *People v. Danis (1973) 31 Cal.App.3d 782 [107 Cal. Rptr. 675]*; *People v. Carpenter (1997) 15 Cal.4th 312 [63 Cal. Rptr. 2d 1, 935 P.2d 708].*) *Verdin* acknowledged that the purpose of Proposition 115 was to restore reciprocity in discovery by limiting certain rights of accused criminals, but stated that the court was bound by *section 1054, subdivision (e)* which prevents the courts from creating a **[*1290]** nonstatutory discovery rule to permit a court to compel a psychiatric examination by a prosecution-retained mental health expert. (*Verdin, at pp. 1107, 1116.*) The court, however, commented that the "Legislature remains free, of course, to establish such a rule within constitutional limits." (*Id. at p. 1116, fn. 9.*)

(4) In 2010, the Legislature enacted *section 1054.3(b)* to provide express statutory authorization for court-ordered mental examinations by prosecution experts. The statute states that "[t]he purpose of this subdivision is to respond to [*Verdin*], which held that only the Legislature may authorize a court to order the appointment of a prosecution mental health expert ..." when a defendant **[**16]** places his or her mental state at issue. (*§ 1054.3(b)(2).*)

The legislative history of *section 1054.3(b)* further indicates that the Legislature intended to restore the reciprocity principle of the criminal discovery law regarding compelled mental examinations. " 'It is imperative when defendants claim a mental defense that they are subject to a mental health examination by a prosecution expert. This right of the prosecution to examine the defendant above their consent has been recognized in case law for over 35 years. However, recently the California Supreme Court overturned the prosecution's entitlement to a court order because Proposition 115 failed to include such a discovery right. AB 1516 restores this right by ensuring that the merits of the defendant's claim be independently verified and guarantees that prosecutor can properly ensure justice for victims.' " (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1516 (2009-2010 Reg. Sess.) as amended Apr. 20, 2009, p. 3.)

Application of *section 1054.3(b)* to cases involving pleas of NGRI furthers the legislative purpose of extending reciprocity to the prosecution in the area of mental examinations. To exclude defendants who plead NGRI from the reciprocity **[**17]** created by *section 1054.3(b)* would unnecessarily limit the intent of the statute, as well as the purpose of Proposition 115.

In addition, our construction of *section 1054.3(b)* is consistent with the purposes of *section 1027. Section 1027, subdivision (a)* provides: "When a defendant pleads not guilty by reason of insanity the court must select and appoint two, and may select and appoint three, psychiatrists, or licensed psychologists ... to examine the defendant and investigate his mental status. It is the duty of the psychiatrists or psychologists so selected and appointed to make the examination and investigation, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question." *Section 1027* also provides details regarding the minimal qualifications of appointed experts, the basic scope of the examination, the duty to testify, and the preparation and disclosure of reports by the appointed experts. **[*1291]**

(5) The object of a procedure focusing on court-appointed experts is to remove the possible bias which may influence the employment of experts by the parties to the action. (*People v. Carskaddon (1932) 123 Cal.App. 177, 180 [11 P.2d 38].*) The appointed experts are **[**18]** agents of the court, not of the parties or their attorneys. (*People v. Lines (1975) 13 Cal.3d 500, 515 [119 Cal. Rptr. 225, 531 P.2d 793].*)

Section 1027, however, does not purport to cover the entire range of actions that may be necessary to assure that the determination of sanity will advance the truth-seeking function of a trial. The statute acknowledges that experts appointed pursuant to its terms are not to be the exclusive source of testimony regarding a defendant's mental condition, and contemplates that the parties will retain their own experts and call those experts as witnesses. *Section 1027, subdivision (d)* provides: "Nothing contained in this section shall be deemed or construed to prevent any party to any criminal action from producing any other expert evidence with respect to the mental status of the defendant ... ."

Moreover, *section 1027* is not part of the criminal discovery law and predates Proposition 115 by several decades. The criminal discovery law exists alongside *section 1027*

and, as we have stated, *section 1027, subdivision (d)* strongly suggests that evidence obtained under the authority of the California discovery law is admissible in sanity trials. Allowing the parties to utilize their own experts to **[**19]** argue the sanity of a defendant conforms to the adversarial truth-finding process of the criminal justice system, and the goal of the discovery law. It permits the prosecution experts to "challenge the defense expert's professional qualifications and reputation, as well as his perceptions and thoroughness of preparation." (*Verdin, supra, 43 Cal.4th at pp. 1115-1116.*)

Verdin expressly left open the question whether *section 1027* itself could be interpreted to enable a court to order that a defendant submit to a mental examination by a prosecution-retained expert. *Verdin* states that the court was expressing "no opinion on whether a statutory basis for a post-Proposition 115 rule might exist in cases ... that involve a plea of not guilty by reason of insanity." (*Verdin, supra, 43 Cal.4th at p. 1107, fn. 4.*) It is evident that *section 1027* contemplates that the defense and prosecution will retain their own mental health experts to testify at a sanity trial. It appears unlikely, however, that the Legislature intended the parties to be able to retain experts but allow the defense to deny prosecution experts equal access to the defendant.

Other cases have broadened the right of the prosecution **[**20]** to compel mental examinations in somewhat similar situations. In *Centeno v. Superior Court (2004) 117 Cal.App.4th 30, 40 [11 Cal. Rptr. 3d 533]*, a defendant invoked the **[*1292]** mental retardation procedure set forth in *section 1376* which permits the court to make "orders reasonably necessary to ensure the production of evidence sufficient to determine whether or not the defendant is mentally retarded, including, but not limited to, the appointment of, and examination of the defendant by, qualified experts." (*§ 1376, subd. (b)(2).*) After a defense-retained expert opined that the defendant was mentally retarded, the prosecution requested and obtained an order compelling the defendant to submit to examination by a prosecution expert. (*Centeno, supra, at pp. 36-37.*) The Court of Appeal concluded that the statute permitted such a compelled examination despite no express authority apart from language permitting the "appointment of, and examination of the defendant by, qualified experts." (*§ 1376, subd. (b)(2).*) The court stated that such statutory authority was necessary to ensure a defendant's claim of mental retardation was appropriately tested. (*Centeno, at p. 40.*) *Verdin* rejected elements of *Centeno*, but agreed **[**21]** that *section 1376, subdivision (b)(2)* provided " 'express statutory' " authority to compel a mental examination by a prosecution expert. (*Verdin, supra, 43 Cal.4th at p. 1105.*)

Similarly, *Baqleh v. Superior Court (2002) 100 Cal.App.4th 478, 489-490 [122 Cal. Rptr. 2d 673]*, held that *section 1369* provided the trial court with authority to compel the defendant to submit to an examination by prosecution-retained experts in a competency proceeding. *Baqleh* acknowledged that *section 1369* expressly provides only for *appointed* experts, but emphasized that expert testimony at a competency trial is not limited to testimony by experts appointed by the court. (*100 Cal.App.4th at pp. 486, 489-490*; see *§ 1369, subd. (a).*) "Considering that a party

that wished to dispute the opinion of a court-appointed expert would be unable to do so effectively without the use of its own expert, the absence of an express statutory restriction on the use of such experts renders it highly implausible that the Legislature intended any such restriction. The Legislature must be deemed to have contemplated that the prosecution's 'case ...' would consist primarily of the testimony of one or more retained experts, ordinarily the most credible and persuasive **[**22]** 'evidence' as to that issue. [Citation.] ... It is hard to imagine that the Legislature intended the parties to be able to retain such experts but to permit the defense to deny the prosecution's experts access to the individual whose competence is at issue, so that they could not credibly dispute the opinions of defense experts given full access to that person. The failure of *section 1369* to explicitly authorize equal access cannot easily be construed as reflecting an intention to enable a defendant to deny it, because that would unfairly obstruct the truth-finding process." (*Baqleh, at p. 490.*)

The reasoning of *Baqleh* and *Centeno* is relevant to *section 1027*. Although the express language of *sections 1376* and *1369* is limited to the appointment of experts by the court, the *Baqleh* and *Centeno* courts both interpreted the **[*1293]** applicable statutes to give prosecution experts equal access to a defendant who has placed his or her mental state at issue. In the instant case, Sharp would have us interpret similar language in *section 1027* as having "specifically addressed" the entire subject of mental examinations in a manner that would prevent the court from ordering a defendant to submit to an **[**23]** examination by a prosecution expert. The *Baqleh* and *Centeno* cases provide a reasoned basis for our rejection of that position.

No Violation of Constitutional Rights

Sharp contends the January 25, 2010, order violates his constitutional rights in several ways. We conclude that his contentions lack merit.

(6) First, Sharp contends that compelling him to submit to a mental examination by a prosecution-retained expert violates his *Fifth Amendment* privilege against self-incrimination and his *Sixth Amendment* right to counsel. It is established that a defendant who pleads NGRI waives his or her *Fifth* and *Sixth Amendment* rights to the extent deemed necessary to permit useful sanity examinations by defense and prosecution mental health experts. (*People v. McPeters, supra, 2 Cal.4th at p. 1190*; *People v. Jantz (2006) 137 Cal.App.4th 1283, 1295 [40 Cal. Rptr. 3d 875]*; see also *Estelle v. Smith (1981) 451 U.S. 454, 464-466 [68 L. Ed. 2d 359, 101 S. Ct. 1866].*) A plea of insanity is a tactical voluntary decision made by a defendant with the advice of counsel, and mental examinations flowing from the plea are not deemed to be compelled. (*People v. Poggi (1988) 45 Cal.3d 306, 329-330 [246 Cal. Rptr. 886, 753 P.2d 1082].*)

Sharp concedes his plea of NGRI waived his rights as to mental examinations by **[**24]** court-appointed experts, but argues the waiver does not extend to the later court-ordered examination by Dr. Mohandie. Sharp cites no authority to support the constitutional significance of this distinction and offers no relevant argument beyond the assertion that the Mohandie

examination was not contemplated or anticipated at the time of his plea.

Second, Sharp contends that the January 25, 2010, order violates his *Fifth* and *Sixth Amendment* rights because it "contains no prophylactic measures or safeguards" to protect his legitimate self-incrimination interest. We agree that Sharp's waiver of constitutional rights is only to the extent necessary to permit useful mental examinations, but conclude that *section 1054.3(b)* and the January 25, 2010, order expressly and implicitly include reasonable safeguards.

(7) *Section 1054.3(b)* requires the People to "submit a list of tests proposed to be administered by the prosecution expert to the defendant in a **[*1294]** criminal action ... . At the request of the defendant in a criminal action ... , a hearing shall be held to consider any objections raised to the proposed tests before any test is administered. Before ordering that the defendant submit to the **[**25]** examination, the trial court must make a threshold determination that the proposed tests bear some reasonable relation to the mental state placed in issue by the defendant in a criminal action or a minor in a juvenile proceeding." The People's motion and the trial court did just that. The tests and procedures Dr. Mohandie intended to administer were included in the motion, and the trial court conducted a hearing to consider defense objections. The motion and hearing directly contradict Sharp's assertion.

Third, Sharp contends that *section 1054.3(b)* violates his due process rights by creating a discovery right for the prosecution without providing for a reciprocal defense right. Sharp analogizes a mental examination regarding the sanity of a defendant pleading NGRI to a mental examination of a prosecution witness by the defense. Sharp's analogy and argument are without any merit. The sole purpose of *section 1054.3(b)* is to restore discovery reciprocity.

Statute Applied Prospectively

Sharp contends that the January 25, 2010, order is an improper retrospective application of a statute that operates prospectively only.

(8) It is presumed that criminal statutes apply prospectively. (*Tapia v. Superior Court (1991) 53 Cal.3d 282, 287 [279 Cal. Rptr. 592, 807 P.2d 434].*) **[**26]** *Section 1054.3(b)* includes no contrary language or other indication to rebut that presumption, and the People concede the statute does not apply retroactively. The People, however, argue that application of *section 1054.3(b)* in this case is a "prospective" application. We agree with the People.

(9) A statute is retrospective if it defines conduct occurring prior to its effective date as criminal, increases the punishment for such conduct, or eliminates a defense to a criminal charge based on the conduct. (*Tapia v. Superior Court, supra, 53 Cal.3d at p. 288.*) Conversely, application of a statute affecting the conduct of "trials which have yet to take place" is not deemed to be retroactive, even if the trial pertains to conduct that occurred prior to the statute's enactment. (*Ibid.*) " '[T]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future.' " (*Ibid.*; see also *People v. Sandoval (2007) 41 Cal.4th 825, 845 [62 Cal. Rptr. 3d 588, 161 P.3d 1146].*)

Section 1054.3(b) permits the trial court to order an additional mental examination in addition to examinations pursuant to *section 1027* and, **[*1295]** thereby, relates to the procedures to be followed in the conduct of a sanity trial. **[**27]** When utilized in the conduct of "trials which have yet to take place," application of *section 1054.3(b)* is deemed to be prospective. (*Tapia v. Superior Court, supra, 53 Cal.3d at p. 288.*) In this case, Sharp's sanity trial had not commenced on the January 1, 2010, effective date of *section 1054.3(b)* and, therefore, its application in this case is prospective and permissible.

(10) Sharp argues that the guilt and sanity phases of his case are part of the same unitary criminal proceeding, and that the guilt phase of trial commenced on October 27, 2009, prior to the effective date of *section 1054.3(b)*. (*People v. Hernandez (2000) 22 Cal.4th 512, 523 [93 Cal.Rptr.2d 509, 994 P.2d 354].*) We agree that there is only one trial in a case involving an NGRI defense. The fact that the sanity phase of the trial "is conducted in a separate proceeding and that the defendant bears the burden of proof does not convert it into a separate criminal ... action." (*Id. at p. 524.*) We do not agree, however, that the trial commenced on October 27, 2009, or at any other time prior to the effective date of *section 1054.3(b)*.

The trial court called the case for the guilt phase trial on October 27, 2009. The process of jury selection and other pretrial preparation began but, on November 6, 2009, Sharp withdrew his not guilty plea to the offenses before the jury was empanelled and, therefore, the guilt phase of the proceeding was terminated without trial. The case was continued to January 11, 2010, to conduct pretrial proceedings for the sanity trial.

(11) Sharp's argument that trial commenced when the case was called for trial on the guilt phase is unpersuasive. Trial may be deemed to commence when jury selection begins for purposes of a particular statute or public policy. (See *People v. Granderson (1998) 67 Cal.App.4th 703, 705, 711-712 [79 Cal.Rptr.2d 268]* [interpreting trial as including jury selection for purposes of *§ 1043, subd. (b)(2)*].) The only reasonable date for the commencement of trial under the circumstances of this case would be when the jury is empanelled and jeopardy attaches. (See *Jackson v. Superior Court (1937) 10 Cal.2d 350, 356 [74 P.2d 243]*; *People v. Rogers (1995) 37 Cal.App.4th 1053, 1057, fn. 3 [44 Cal.Rptr.2d 107]*; *People v. Gephart (1979) 93 Cal.App.3d 989, 998 [156 Cal.Rptr. 489].*) The effect of Sharp's change of plea was to eliminate the necessity of a guilt trial, not to constitute the trial. Although part of a single unitary proceeding, the guilt and sanity phases of an NGRI case are conducted in separate hearings and concern entirely different issues. No purpose would be served by artificially treating the trial to have commenced when Sharp changed his plea merely because jury selection was in progress at that time.

Sharp also argues that *section 1054.3(b)* is being applied retrospectively in this case because it creates a new obligation and imposes a new duty and **[*1296]** "disability" on defendants who plead **[**28]** NGRI. We disagree. Based on his plea, Sharp had the obligation and duty to submit to mental examinations as set forth in *section 1027* and to accept the consequences of testimony from these and other mental

health experts at trial. Sharp may be concerned that the testimony by Dr. Mohandie will be adverse to his interests, but it will not increase the punishment for Sharp's conduct, or eliminate a defense to a criminal charge based on the conduct. (*Tapia v. Superior Court, supra, 53 Cal.3d at p. 288.*)

In a related argument, Sharp claims he justifiably relied to his detriment on the law in existence in 2009. It is not entirely clear whether he intends this argument to pertain to the issue of retroactivity or as support for some fairness proposition that is not revealed by his argument. In either case, Sharp cites no authority which supports his position.

Moreover, his argument regarding detrimental reliance is unpersuasive. He asserts that he made a "tactical" decision to provide full discovery to the prosecution in 2009 or earlier, changed his plea to guilty as to the offenses and thereby gave up his right to a jury trial and to any contentions that could have been made in pretrial motions. **[**29]** These assertions, however, do not show prejudice. Sharp does not explain how his decisions prior to 2010 would have been significantly different if he knew that he could be ordered to submit to a mental examination by a prosecution expert. Also, Sharp was aware of *Verdin*, its invitation for the Legislature to act, and the fact that the law regarding court-ordered mental examinations was to some degree unsettled. (See *People v. Richardson (2008) 43 Cal.4th 959, 998 [77 Cal. Rptr. 3d 163, 183 P.3d 1146].*)

No Abuse of Discretion

Sharp contends the trial court abused its discretion by ordering him to submit to an examination by Dr. Mohandie. Sharp argues that the amount of fees paid or to be paid to Dr. Mohandie exceeded the "fee cap" established by *section 1027, subdivision (d)*, and, for this reason, the trial court should have denied the prosecution's motion. We disagree.

(12) *Section 1027, subdivision (d)* provides: "Nothing contained in this section shall be deemed or construed to prevent any party to any criminal action from producing any other expert evidence with respect to the mental status of the defendant; *where expert witnesses are called by the district attorney in such action, they shall only be entitled to such witness* **[**30]** *fees as may be allowed by the court.*" (Italics added.) The language of the statute gives the trial court discretion to determine the propriety of the prosecution's expert witness fees. The record before us is insufficient for us to make any **[*1297]** determination regarding the propriety of witness fees that have been or may be paid to Dr. Mohandie, much less a determination of whether the court abused its discretion in that regard. In his briefs, Sharp asserts that the People have already paid Mohandie $ 32,000 but the appellate record is otherwise silent on the subject. Also, nothing in *section 1027, subdivision (d)* establishes any particular monetary "fee cap." The statute provides only that an expert witness who is "called by the district attorney" at trial is limited to fees "allowed by the court."

Sharp also argues that the court abused its discretion in making the January 25, 2010, order because Dr. Mohandie was involved in a prior discovery dispute. Sharp argues that Dr. Mohandie and the prosecution failed to comply with discovery rules with respect to submission of a written re-

port. The record includes a court order requiring Dr. Mohandie to file a report, but there is nothing in the record [**31] establishing discovery abuse, or showing other conduct that would be material to the exercise of the trial court's discretion in making the January 25, 2010, order.

The writ is denied.

Gilbert, P. J., and Coffee, J., concurred.

DECLARATION OF SERVICE

Case Name: ***Calvin Sharp, Petitioner, v. The Superior Court of Ventura County, Respondent; The People, Real Party in Interest.***

Case No.: **S_____ from Ct. App. 2/6 B222025 [Superior Court No. 2008014330]**

On February 15, 2011, I, Jeane Renick, declare: I am over the age of 18 years and not a party to the within action or proceeding. I am employed in the Office of the Ventura County Public Defender. My business address is 800 South Victoria Avenue, Ventura, California 93009. On this date, I personally served the following named persons at the places indicated herein, with a full, true and correct copy of the attached document: **Petition for Review of an Opinion Certified for Publication:**

Gregory Totten, District Attorney
Hall of Justice, 3rd Floor
Attn: Lisa Lyytekainen, SrDDA
800 South Victoria Avenue
Ventura, CA 93009
(Counsel for The People)

Hon. Kevin G. DeNoce, Judge AND
Michael Planet, Exec. Officer, Superior Court
800 S. Victoria Avenue, 2nd Flr HOJ
Ventura, CA 93009
(Trial Judge)

I am "readily familiar" with the County of Ventura's practice of collection and processing correspondence for mailing. Under that practice outgoing correspondence would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Ventura, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one business day after date of deposit for mailing affidavit. On this date, I served the attached **Petition for Review of an Opinion Certified for Publication** by placing in the U. S. Mail, a full, true, and correct copy thereof in an envelope addressed to the persons named below at the addresses set out below, by sealing and depositing said envelope in the Ventura County U.S. Mail collection center in the ordinary course of business:

Calif. Ct. of Appeal, Clerk's Office, 2nd Dist., Div. 6, 200 E. Santa Clara St., Ventura, CA 93001; Hon. Kamala Harris, Atty. General, 300 S. Spring St. 5th Flr/N Twr, Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on the above date at San Buenaventura, California.

STEPHEN P. LIPSON, Public Defender

By: _____
Jeane Renick
Legal Mgmt Asst.