

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.

S190646

Ct. App. 2/6 B222025

Ventura County  
Super. Ct. No. 190646  
SUPREME COURT  
FILED

JUN 07 2011

Frederick K. Ohrich Clerk

Deputy

OPENING BRIEF ON THE MERITS



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  
800 S. Victoria Avenue, HOJ-207  
Ventura, California 93009  
(805) 477 - 7114  
[michael.mcmahon@ventura.org](mailto:michael.mcmahon@ventura.org)  
Attorney for Petitioner  
CALVIN LEONARD SHARP

**IN THE SUPREME COURT OF CALIFORNIA**

CALVIN LEONARD SHARP,

Petitioner,

v.

THE SUPERIOR COURT OF VENTURA  
COUNTY,

Respondent,

THE PEOPLE,

Real Party in Interest.

**S190646**

Ct. App. 2/6 B222025

Ventura County

Super. Ct. No. 2008014330

**OPENING BRIEF ON THE MERITS**

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  
800 S. Victoria Avenue, HOJ-207  
Ventura, California 93009  
(805) 477 - 7114  
michael.mcmahon@ventura.org  
Attorney for Petitioner  
CALVIN LEONARD SHARP

## TABLE OF CONTENTS

	Page:
Table of Contents . . . . .	i
Table of Authorities . . . . .	iii
Opening Brief on the Merits. . . . .	1
The Issue . . . . .	1
The Answer . . . . .	2'
Discussion . . . . .	2
I. In 2009, no existing provision of law addressed procedures for the evaluation of a defendant's mental condition in a case in which the defendant did not enter a plea of "not guilty by reason of insanity." . . . .	2
II. 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. . . . .	3
III. 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. . . . .	6
IV. 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 States 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. . . . .	8

Conclusion . . . . .	17
Certificate of Word Count . . . . .	18
Court of Appeal Decision of February 4, 2010 . . . . . attached	
Declaration of Service . . . . .	End

## TABLE OF AUTHORITIES

Page:

### Constitutions:

U. S. Constitution . . . . .	4
Fifth Amendment . . . . .	8

### Cases:

<i>Buchanan v. Kentucky</i> (1987) 483 U.S. 402 . . . . .	8
<i>Cacho v. Boudreau</i> (2007) 40 Cal.4th 341 . . . . .	6
<i>Estelle v. Smith</i> (1981) 451 U.S. 454 . . . . .	7, 8
<i>In re Winship</i> (1970) 97 U.S. 358 . . . . .	2
<i>Lexin v. Superior Court</i> (2010) 47 Cal.4th 1050 . . . . .	6
<i>Mullaney v. Wilbur</i> (1975) 421 U.S. 684 . . . . .	2
<i>People v. McPeters</i> (1992) 2 Cal.4th 1148 . . . . .	8
<i>People v. Lee</i> (1930) 108 Cal.App. 609 . . . . .	3
<i>People v. Saille</i> (1991) 4 Cal. 3d 1103 . . . . .	2
<i>People v. Steele</i> (2002) 27 Cal.4th 1230 . . . . .	2
<i>Powell v. Texas</i> (1989) 492 U.S. 680 . . . . .	8
<i>Verdin v. Superior Court</i> (2008) 43 Cal.4th 1096 . . . . .	passim

### Statutes and Rules:

Health & Safety Code, § 11362.5 . . . . .	7
Pen. Code, § 25 . . . . .	7
Pen. Code, § 28 . . . . .	7
Pen. Code, § 29 . . . . .	7
Pen. Code, § 290 . . . . .	7

Pen. Code, § 1016 . . . . .	3
Pen. Code, § 1026 . . . . .	1
Pen. Code, § 1027 . . . . .	passim
Pen. Code, § 1027, subd.(d) . . . . .	2, 3
Pen. Code, § 1054.3 . . . . .	passim
Pen. Code, § 1054.3, subd.(b) . . . . .	4, 6
Pen. Code, § 3003.5 . . . . .	7
Pen. Code, Title 6, Chap. 4, § 1026 . . . . .	6
Stats. 1981, c. 787, p. 3057, § 1 . . . . .	2
Welf. & Inst. Code, § 602 . . . . .	4, 5

# IN THE SUPREME COURT OF CALIFORNIA

CALVIN LEONARD SHARP,

Petitioner,

v.

THE SUPERIOR COURT OF VENTURA  
COUNTY,

Respondent,

THE PEOPLE,

Real Party in Interest.

S190646

Ct. App. 2/6 B222025

Ventura County

Super. Ct. No. 2008014330

## OPENING BRIEF ON THE MERITS

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

Petitioner respectfully submits this opening brief on the merits:

### THE ISSUE

Does Penal Code section 1054.3, subdivision (b), as amended effective January 1, 2010, alter the existing provisions of law regarding court-ordered examinations of criminal defendants in sanity proceedings, specifically Penal Code sections 1026 and 1027?

## THE ANSWER

Penal Code section 1054.3, subdivision (b), as amended effective January 1, 2010, does not alter the existing provisions of law regarding court-ordered examinations of criminal defendants in sanity proceedings because neither the text of the amendment, nor the legislative intent behind it supports an alteration of procedures for the assessment of sanity.

### Discussion

#### I.

**In 2009, no existing provision of law addressed procedures for the evaluation of a defendant's mental condition in a case in which the defendant did not enter a plea of "not guilty by reason of insanity."**

In 2009, a defendant in a criminal case could enter a plea of "not guilty" and present evidence tending to show his mental condition affected his guilt. (See, *People v. Steele* (2002) 27 Cal.4th 1230, 1253 [a defendant may present evidence that an extreme emotional disturbance or other mental condition negated a state of mind required as an element of a charged offense].) For example, evidence of mental disease, disorder, or defect is admissible on the issue of whether the defendant actually formed an unlawful intent to kill, that is, whether the defendant actually harbored express malice. (*People v. Saille* (1991) 4 Cal. 3d 1103, 1116.) Such evidence could include testimony from a mental health expert, who had interviewed and evaluated the defendant.

As a matter of federal due process, if a crime requires a particular mental state, the Legislature may not deny a defendant the opportunity to prove he did not harbor that state. (*In re Winship* (1970) 97 U.S. 358; *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

Nevertheless, no then-existing provision of law allowed for any court-ordered evaluation of the defendant's mental condition at the time of the charged offense. (*Verdin v. Superior Court* (2008) 43 Cal.4th 1096 (*Verdin*). Many concluded that this gave the defendant an unfair advantage at trial.



In contrast, California had very different procedures in place for cases in which a defendant entered a plea of “not guilty by reason of insanity. (Pen. Code, § 1016.) In such cases, court-ordered examinations of the defendant are addressed by Penal Code section 1027 and are mandatory. Section 1027 has been in the code since 1929, and was last amended in 1981. (Stats. 1981. c. 787, p. 3057, § 1.) The purpose of section 1027 is to mandate court-ordered examinations of the defendant to aid and assist the court and jury in the determination of the sanity issue. (*People v. Lee* (1930) 108 Cal.App. 609, 612.) Nothing precludes the prosecution from requesting that specific experts be appointed or that the experts administer specific psychological tests or instruments. Such requests and suggestions can be extremely helpful because the forensic and custodial settings differ greatly from regular clinical practice.

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.”

## II.

**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 to determine sanity.**

In *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 addressed by the existing provisions of section 1027. (*Id.*, at p. 1107, fn. 4.)

After conceding 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 measured legislative response to the court's holding in *Verdin*, the amendment was not intended to amend or repeal by implication the state's long-existing scheme for litigation of the issue of sanity. The Legislature's caution is understandable given the legitimate concern that any procedural changes must comply with due process and other constitutional rights and privileges.

### III.

**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.**

Generally, statutes in pari materia should be construed together so that all parts of the statutory scheme are given effect. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-1091.) However, because the 2010 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 examine the defendant and respond to the testimony of a defense expert. Abridging the rights of the defendant was not a viable option. As long as a specific state of mind is a necessary element of an offense, a defendant cannot be

prohibited from presenting relevant evidence raising a doubt about whether that state of mind was present.<sup>1</sup>

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.

#### IV.

**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 States 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

---

<sup>1</sup> Mental health experts are less important in the guilt phase of a trial in the wake of various amendments to the Penal Code which expressly eliminated the “diminished capacity” defense (Pen. Code, §§ 25, 28) and Penal Code section 29, which severely limits expert testimony about the defendant’s mental status.

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 very effective and economical 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 High 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.

### **Conclusion**

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. Based upon the expressed statement of legislative intent and the plain meaning of the 2010 amendment, it does not change existing provisions of law regarding the evaluation, assessment, and determination of sanity.

Dated: June 6, 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 3500 words in Times New Roman 13 pt. font in this document, excluding Declaration of Service.

Dated June 6, 2011.

A handwritten signature in cursive script, appearing to read "Jeane Renick", written in black ink. The signature is positioned above a horizontal line.

Jeane Renick  
Legal Mgmt Asst. III



**DECLARATION OF SERVICE**

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

Case No.: **S190646 from Ct. App. 2/6 B222025 [Superior Court No. 2008014330]**

On June 6, 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: **Opening Brief on the Merits:**

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

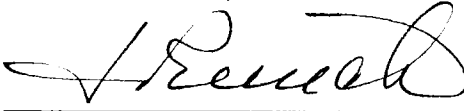
Hon. Kevin G. DeNoce, Judge      AND  
Michael Planet, Exec. Officer, Superior Court  
800 S. Victoria Avenue, 2nd Flr HOJ  
Ventura, CA 93009  
(Trial Judge)

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 **Opening Brief on the Merits** 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, 2<sup>nd</sup> Dist., Div. 6, 200 E. Santa Clara St., Ventura, CA 93001;  
Hon. Kamala Harris, Atty. General, 300 S. Spring St. 5<sup>th</sup> 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.