IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ROYAL CLARK,** Defendants and Appellants.	**S045078** (Fresno County Superior Court No. 446252-9)

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
RENDERED IN FRESNO COUNTY SUPERIOR COURT
HONORABLE JOHN E. FITCH, JUDGE PRESIDING

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Appellant, Royal Clark, through his attorney, Melissa Hill, submits the following supplemental arguments not previously raised in the Appellant's Opening Brief.

INTRODUCTION

The Appellant's Opening Brief in this case was filed in June of 2003. Five years later, on June 2, 2008, this Court filed its decision in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096. *Verdin* held that the discovery provisions of Proposition 115, adopted in 1990, abrogated the holdings in *People v. Danis* (1973) 31 Cal.App.3d 782, *People v. McPeters* (1992) 2 Cal.4th 1148, and *People v. Carpenter* (1997) 15 Cal.4th 312. Accordingly, following the adoption of Proposition 115, a defendant who places his mental state at issue may no longer be forced to submit to mental health

evaluation by the prosecution's expert.

Appellant was erroneously ordered to submit to mental health evaluations by three mental health evaluators retained by the prosecutors. This Appellant's Supplemental Opening Brief is filed for the purpose of raising the error, which appellate counsel did not have the prescience to raise given the case law extant at the time the Appellant's Opening Brief was filed.

STATEMENT OF PROCEDURE AND FACTS

Appellant adopts and incorporates by reference the Statement of Facts set forth in the Appellant's Opening Brief.

Appellant presented a guilt-phase defense of diminished actuality, which included testimony by a neuropsychologist, a psychologist, and a neurologist. (RT 6307, 7122 [Dr. R.K. McKinzey]; RT 6352, 8989 [Dr. Paul Berg]; RT 7035, 8916 [Dr. Sateesh Apte].) Prior to this, the People had filed a notice of intent to present mental health evidence in rebuttal, should appellant present any guilt phase mental defenses. (CT 689.) During trial proceedings on November 23, 1993, the prosecutor asked the court for orders requiring appellant to submit to evaluation by several mental health experts. (RT 7030.) At this time, appellant's counsel, Barbara O'Neill, voiced no objection. (RT 7030.)

On November 28, 1993, Dr. Michael J. Thackrey, a psychologist, conducted a forensic interview with appellant regarding his family and social history and the alleged crimes, and administered an MMPI test. (RT 8240.) On November 30, 1993, Dr. Bradley A. Schuyler, a neuropsychologist, conducted a general diagnostic interview with appellant in jail, and questioned appellant about the charged crimes. (RT 7981-7986.)

On December 7, 1993, defense counsel received a resume for Dr.

James R. Missett, a psychiatrist retained by the prosecutor to conduct a psychiatric evaluation of appellant. (RT 7956.) Defense counsel Barbara O'Neill advised the court that appellant intended to refuse to submit to interview by yet another prosecution expert. (RT 7956.) Appellant did not wish to be interviewed by any more doctors who were "trying to kill" him. (RT 7956.) O'Neill agreed to stipulate in front of the jury that appellant had refused to be interviewed by Dr. Missett. (RT 7957-7959.)

Dr. Schuyler and Dr. Thackrey testified as prosecution rebuttal witnesses on December 9, 1993. (RT 7961, 8186.) On December 10, 1993, the prosecution called Dr. Missett as a rebuttal witness. (RT 8275.) Consistent with her promise, defense counsel stipulated before the jury that appellant had indicated he would be willing to submit to any physical or written testing by Dr. Missett, but had refused to speak with him. (RT 8284.)

On January 4, 1994, the jury returned verdicts finding appellant guilty of capital murder. (RT 9404.)

Following the guilt phase verdicts, a trial was held on appellant's plea of not guilty by reason of insanity. Prior to commencement of the sanity trial, the trial court denied appellant's motion for a new jury, and refused a request by defense counsel to have jurors questioned to insure that none had prejudged the case. (RT 9455-9464.)

The court issued an order allowing Dr. Missett to examine appellant pursuant to Penal Code section 1026. (RT 9464.) Once again, counsel objected by indicating that appellant would not cooperate and be interviewed. (RT 9464-9465.)

During his opening remarks to the jury, the prosecutor advised the jury that the evidence would show that "again the defendant has refused to

be examined by Dr. Missett." (RT 9484.) During the sanity trial, Dr. Missett testified, inter alia, that he had been "informed that the defendant refused to meet with [him] and be evaluated or interviewed." (RT 9646.)

On January 20, 1994, the jury returned verdicts finding appellant sane on all counts. (RT 9947.)

ARGUMENTS

I

THE ORDERS FOR EVALUATIONS OF APPELLANT BY DRS. SCHUYLER, THACKREY AND MISSETT WERE MADE IN VIOLATION OF PENAL CODE SECTION 1054.3.

In *Verdin v. Superior Court*, *supra*, 43 Cal.4th 1096, the defendant noticed his intention to defend against criminal charges by relying on a diminished actuality defense, and, in support, produced a report detailing the results of the defense psychological expert's evaluation. As occurred in this case, the trial court granted a motion by the prosecution to have access to the defendant for the purpose of conducting its own mental evaluation. The defendant in *Verdin* petitioned for a writ of mandate to stop the evaluation. The Court of Appeal denied the petition, but this Court stayed the psychiatric examination ordered by the trial court and granted review to consider the lawfulness of the trial court's order in the wake of major changes to California's discovery laws that resulted from the approval of Proposition 115 on June 5, 1990.

The essential holdings of *Verdin* include the following. A mandatory examination by a prosecution mental health expert is a form of pretrial discovery. (*Verdin v. Superior Court, supra*, at p.1104.) Penal Code section 1054, subdivision (e), adopted as a part of Proposition 115 in 1990, provides that "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." (*Id.*, at p. 1106.) Penal Code section 1054.3, which governs disclosure of information to the prosecution, does not expressly authorize a trial court to order a psychiatric evaluation by a retained prosecution expert. (*Id.*, at pp. 1106-1107.) Therefore, the

decisions in *People v. Danis, supra*, 31 Cal.App.3d 782, *People v. McPeters, supra*, 2 Cal.4th 1148, and *People v. Carpenter, supra*, 15 Cal.4th 312, which previously held that trial courts had the *inherent* power to authorize such court-compelled evaluations, did not survive the passage of Proposition 115. (*Id.*, at p. 1106.)

In *Verdin*, this Court further held that court-ordered evaluations by prosecution-retained mental health experts were not authorized by Penal Code section 1054.4, which provides: "Nothing in this chapter shall be construed as limiting any law enforcement or prosecuting agency from obtaining *nontestimonial* evidence to the extent permitted by law on the effective date of this section." (*Verdin v. Superior Court, supra*, 43 Cal.4th at pp. 1110-1113.) The Court recognized that a court-ordered psychiatric examination "would unquestionably be testimonial" (*id.*, at p. 1112) because it requires a defendant to "communicate, to provide his opinions and ideas, to describe his perceptions, to reveal the contents of his mind; in short, to serve as a witness against himself." (*Ibid.*)

Last but not least, the Court rejected arguments advanced by the People in *Verdin* that a court-ordered psychiatric evaluation was *mandated* by the state and/or federal constitution. The Court acknowledged that it was probable the People could more effectively challenge a defendant's anticipated mental defenses if a prosecution expert were granted access to conduct a mental evaluation. The Court nevertheless concluded that the People's strong interest in prosecuting criminals could be vindicated by challenging mental defenses in other ways. (*Id.*, at pp. 1115-1116.)

Appellant's case falls squarely within the rubric of the *Verdin* decision. His case was tried in 1993, several years after the passage of Proposition 115. The trial court no longer retained the inherent authority to

order him to submit to evaluations by a neuropsychologist, a neurologist *and* a psychologist, all retained by the prosecution. Appellant was apparently willing to cooperate with any nontestimonial testing (RT 7956, 8284), arguably authorized by Penal Code section 1054.4, but this is not what was done. Dr. Thackrey and Dr. Schuyler conducted interviews which elicited intrinsically incriminating, essentially testimonial evidence, including appellant's account of his social and family history, and even his version the charged crimes. (RT 7981-7986, 8240.)

Dr. Missett was unable to interview appellant because he refused to cooperate. However, the jury was twice informed, consistent with pre-1990 case law, of appellant's refusal to cooperate. (*People v. McPeters, supra,* 2 Cal.4th at p. 1190; see, RT 8284, 9484, 9646.) The trial court's order to allow evaluations by the People's mental health experts was in contravention of Penal Code section 1054.3.

II

THE ORDER TO SUBMIT TO EVALUATION BY DR. MISSETT, DURING THE SANITY PHASE, WAS MADE IN VIOLATION OF PENAL CODE SECTION 1027.

When a defendant enters a plea of 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." (Pen. Code, § 1027, subd. (a).) Such court-appointed experts may be called by either party to the action or by the court. (Pen. Code, § 1027, subd. (e).) Nothing Penal Code section 1027 explicitly authorizes the court to order a defendant to submit to evaluation by a *prosecution-retained* psychiatrist or psychologist. (Cf. *People v. Baqleh* (2002) 100 Cal.App.4th 478 [holding that a court has statutory authority to compel a defendant to submit to evaluation by the prosecution's expert in a competency proceeding (Pen. Code, § 1368 et.seq.)].) Because "no discovery shall occur in criminal cases except as provided by [Penal Code section 1054 et seq.], other express statutory provisions, or as mandated by the Constitution of the United States," (Pen. Code, § 1054, subd. (e)), the pre-sanity phase order to allow the examination by Dr. Missett was unlawful.

In this case, the trial court appointed two experts to evaluate appellant's sanity pursuant to Penal Code section 1027, subdivision (a): Dr. Mark Brooks (RT 67, 69, 9534, 9646; CT 501-503, 1814-1818); and Dr. Richard King (RT 9646; CT 501, 1825-1830). Although the People asked the court to order appellant to submit to another evaluation by Dr. Missett

"in the nature of a 1026 examination," (RT 9464), in fact, what the prosecutor was requesting was to compel appellant to submit to evaluation by a prosecution-retained expert. (See, *People v. Baqleh, supra*, 100 Cal.App.4th at p. 488 ["What the district attorney requested and the court granted was instead an order directing petitioner to submit to evaluation by an expert retained by the People."].) This type of discovery was *not* explicitly authorized by either Penal Code section 1026 or 1027.

Nor was the order to submit to evaluation by Dr. Missett required by the United States Constitution, in order to vindicate the prosecutor's due process rights. (*Verdin v. Superior Court, supra,* 43 Cal.4th at pp.1115-1116.) Manifestly, the People had other viable means of contesting the testimony of the sole defense expert on the insanity issue, Dr. Paul Berg, including the presentation of testimony by Dr. Mark Brooks (RT 9729-9771), who was appointed by the court pursuant to Penal Code section 1027.

III

COMMENT ON APPELLANT'S REFUSAL TO BE INTERVIEWED BY DR. MISSETT WAS IMPROPER.

During the guilt phase trial, defense counsel stipulated in front of the jury that appellant had refused to be interviewed by Dr. Missett. (RT 8284.) During the sanity trial, the prosecutor argued, and Dr. Missett testified, that appellant had refused to grant the doctor an interview. (RT 9484, 9646.)

This Court has previously held that when a defendant refuses a properly ordered examination by the People's expert to determine mental status, comment on the refusal is permissible. (*People v. McPeters, supra*, 2 Cal.4th at p. 1190; cited with approval in *People v. Coddington* (2000) 23 Cal.4th 529, 611-612.) However, prior cases addressed this issue in the context of mental health examinations ordered prior to the effective date of Proposition 115. Since the court's *post*-Proposition 115 orders to submit to evaluations by Dr. Missett were *unlawful* (*Verdin v. Superior Court, supra*, 43 Cal.4th 1096), it follows *ipso facto* that comment upon appellant's refusal to be interviewed at both the guilt and sanity phases of the trial was also improper.

IV

THE COURT FAILED TO INSTRUCT, CONSISTENT WITH CALJIC NO. 2.10, THAT THE JURY COULD CONSIDER APPELLANT'S STATEMENTS TO DRS. SCHUYLER AND THACKREY ONLY TO SHOW THE BASIS OF THE EXPERTS' OPINIONS AND NOT FOR THEIR TRUTH.

Dr. Thackrey conducted an interview with appellant in jail; he asked appellant about his family and social history, and also asked specific questions about appellant's version of the facts of the crimes. (RT 8240.) In testimony before the jury, Dr. Thackrey specifically referred to appellant's account of the crimes, and characterized it as showing "sustained, complex, purposeful sequences of behavior over a period of time." (RT 8253.) He also testified at length regarding specific aspects of appellant's account of the sequence of events at the park, and during his drive home. (RT 8254 et seq.)

Dr. Schuyler also interviewed appellant about his social history, including his psychiatric history, and what he recalled about the night of the alleged crimes. (RT 7982, 7986, 8058-8059, 8074.) During the guilt phase trial, Dr. Schuyler, too, testified regarding a number of appellant's statements, including what appellant had told him about his seizure history (RT 8059), and past acts of arson. (RT 8075).

It is well settled that an expert's testimony as to the defendant's incriminating statements may not be regarded as proof of the facts described in such statements. (*People v. Ledesma* (2006) 39 Cal.4th 641, 697; *People v. Williams* (1988) 45 Cal.3d 1268, 1327.) Despite the repeated emphasis by prosecution mental health experts on what appellant said happened at various times, however, the trial court gave no instruction at either the guilt

or sanity phase of the trial, that the jury could only consider appellant's statements to doctors to show the bases for the experts' opinions and not for their truth. (See, *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1293, fn. 3; former CALJIC No. 2.10.) The court, accordingly, failed to strike the requisite balance between the need to protect appellant's constitutional rights against self-incrimination, and to counsel, and the need for a meaningful evaluation of his mental condition. (*In re Spencer* (1965) 63 Cal.2d 400, 411- 412; *People v. Jantz, supra.*) As a consequence, the jury was improperly allowed to consider all of appellant's extrajudicial statements to doctors for the truth of the matters asserted.

V

THE ERRORS WERE NOT WAIVED BECAUSE UNDER THE STATE OF THE LAW AT THE TIME OF THE TRIAL, IT WOULD HAVE BEEN FUTILE TO OBJECT, AND THE SUBSTANTIAL RIGHTS OF THE APPELLANT WERE AFFECTED.

Although appellant personally objected to both orders to be interviewed by Dr. Missett, no objection was advanced by appellant or defense counsel when evaluations by Drs. Thackrey and Schuyler were initially proposed. Appellant assumes that respondent will argue that appellant's right to challenge the evaluations was forfeited by the absence of a contemporaneous objection.

The failure to object does not result in a waiver of error when objecting would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 821.) In 1992, two years after the effective date of Proposition 115, this Court reaffirmed the authority of trial courts to order a defendant to submit to evaluation by prosecution-retained mental health experts whenever mental defenses are asserted. (*People v. McPeters, supra*, 2 Cal.4th 1148.) Indeed, until *Verdin* was decided in June of 2008, the settled state of the law appeared to be that a defendant had no right to refuse to cooperate with a prosecution-retained psychologist or psychiatrist once he or she presented expert testimony regarding mental condition. (*People v. Coddington, supra*, 15 Cal.4th at pp. 412-413.) Defense counsel would have had no reason to predict that, more than a decade after appellant's trial, this Court would construe the 1990 Crime Victims Justice Reform Act as having superceded and overruled the decisions in *McPeters*, *Coddington*, and *People v. Danis, supra*, 31 Cal.App.3d 782. As in *People v. Ogunmola* (1985) 39 Cal.3d 120, 123, and *In re Gladys R.* (1970) 1 Cal.3d 855, 861, this Court should reject

any assertion of forfeiture or waiver.

Indeed, in the recent of *People v. Wallace* (2008) 44 Cal. 4th 1032, 1087, this Court addressed a claim of *Verdin* error despite the trial attorney's apparent failure to assert the error in the trial court. This Court should address the error in this case as well.

Respondent will no doubt argue that defense counsel's failure to request a limiting instruction, such as former CALJIC No. 2.10, forfeits any claim that the failure to instruct was error. This argument, too, should be rejected. This Court should exercise discretion to address the instructional error on the merits because the "substantial rights of the defendant were affected thereby." (Pen. Code, § 1259; *People v. Jantz* (2006) 1 37 Cal.App.4th 1283, 1294 [reviewing the failure to give CALJIC No. 2.10 on the merits because the substantial rights of the defendant were affected]; cf. *People v. Ledesma, supra*, 39 Cal.4th at pp. 697-698 [finding forfeiture but addressing the merits nonetheless].)

VI

THE ERRORS WERE INDIVIDUALLY AND CUMULATIVELY PREJUDICIAL.

As this Court observed in *Verdin v. Superior Court, supra*, "the use of evidence from an undesired psychiatric examination to convicted a criminal defendant may have constitutional implications." (*Id.*, at p. 1102; citing *Estelle v. Smith* (1981) 451 U.S. 454.) The information derived from psychiatric interviews by the People's experts was (1) incriminating, (2) personal to appellant, (3) obtained by compulsion, and (4) testimonial or communicative in nature. Absent a knowing and intelligent waiver, these circumstances are ordinarily enough to trigger the Fifth Amendment privilege against self-incrimination. (*Verdin v. Superior Court, supra*, 43 Cal.4th at p. 1110; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 366.) In this case.

Furthermore, in this case, with respect to Drs. Thackrey and Schuyler, appellant was not apparently told that he could "preserve his [self-incrimination and counsel] rights by refusing to cooperate." (*People v. Coddington, supra*, 23 Cal.4th at p. 61.) The People's experts were not directed to refrain from asking appellant questions about the charged crimes, a protective measure taken by the trial court in the *Carpenter* case. (Cf. *People v. Carpenter, supra*, 15 Cal.4th at p. 412.) Nor was the jury instructed that appellant's extrajudicial statements to experts could not be considered except to show the basis of the experts' opinions. (*In re Spencer, supra*, 63 Cal.2d 400.) Under the circumstances, appellant's constitutional rights clearly *were* implicated and the errors should be subjected to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24.)

However, even if this Court chooses to review *Verdin* and/or *Spencer*

error under the lesser *Watson* standard of review (*People v. Watson* (1956) 46 Cal.2d 818, 836), the judgment must be reversed in appellant's case. At the guilt phase, appellant presented lengthy and detailed testimony by a number of highly credible, qualified mental health experts – Dr. McKinzey, Dr. Apte, and Dr. Berg – who believed appellant killed the victim during a seizure-related rage reaction, symptomatic of his longstanding mental illness and brain dysfunction. (RT 6307-6352, 6352-6476, 7035-7119, 7122-7270, 7272-7787, 7796-7874.)

Several prosecution-retained experts, Dr. Douglas Goodin, and Dr. Harvey Edmonds, neurologists who did not examine appellant, disagreed with Dr. Apte's interpretation of the results of Roy's EEG and QEEG testing. (See, RT 7882-7947, 8454-8455, 7901-7913, 7953, 8454-8481, 8110-8118.) Without testimony from Dr. Thackrey and Dr. Schuyler, however, there would have been little rebuttal expert testimony upon which the jury could reject the lion's share of the defense mental health experts' findings. Under such circumstances, it is reasonably probable that a more favorable outcome would have resulted had the improperly ordered mental health evaluations not occurred.

At the trial of appellant's NGI plea, Dr. Berg gave credible testimony that appellant was legally insane at the time of his crimes. (RT 9523 et seq.) As rebuttal witnesses, the People called Dr. Missett – who did not interview appellant – and Dr. Brooks, who had conducted a sanity evaluation for the court. In the opinion of Dr. Missett and Dr. Brooks, appellant was not legally insane at the time of his crimes. (RT 9643-9658, 9729-9736, 9770-9771.)

Although the evidence was more closely balanced at the sanity trial than at the guilt phase trial, it is nonetheless reasonably probable that the jury

would have found appellant insane at the time of his crimes, had it not been for the unlawful orders to submit to evaluations by Drs. Thackrey, Schuyler and Missett. Prior to the sanity trial, the trial court refused to canvass the jury to determine whether any jurors had prejudged issue of sanity based on evidence adduced at the guilt phase trial. (RT 9455-9464.) Hence, there is no way of knowing to what extent the guilt phase testimony of Drs. Thackrey and Schuyler may have influenced the outcome of the sanity trial. Furthermore, allowing jurors to repeatedly hear that appellant had refused to be interviewed by Dr. Missett may well have tipped the scales in favor of rejecting appellant's defense of not guilty by reason of insanity. The errors were accordingly prejudicial no matter which standard of review is applied.

In addition, the trial court's violation of Penal Code section 1054, et seq., deprived appellant of his state-created liberty interest in the correct, non-arbitrary application of California's state laws, which results in a violation of the Fourteenth Amendment's due process clause. Moreover, because this is a death penalty case, these fundamental defects in the guilt and sanity phase proceedings deprived the guilt, sanity and penalty judgments of reliability in violation of the Eighth Amendment and article I, section 17 of the California Constitution.

CONCLUSION

For the foregoing reasons, as well as the reasons previously asserted in the Appellant's Opening and Reply Briefs, the sanity and penalty judgments must necessarily be reversed.

Dated: October 13, 2008

Respectfully submitted,

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid County, State of California; I am over the age of eighteen years and am not a party to the within action; my business address is 1448 15th Street, Suite 206, Santa Monica, California 90404.

On October 23, 2008, I served the foregoing **APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF** on the Interested Parties in this action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail in Santa Monica, California, addressed as follows:

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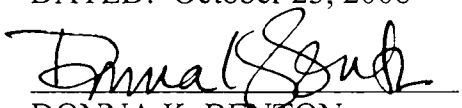
ROYAL CLARK, appellant (address omitted per CRC 37(a))

This document is filed and served on paper purchased as recycled. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: October 23, 2008



DONNA K. BENTON