*In the Supreme Court of the State of California*

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| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br><br>**Plaintiff and Respondent,**<br><br>**v.**<br><br>**ROYAL CLARK,**<br><br>**Defendant and Appellant.** | **CAPITAL CASE**<br><br>Case No. S045078 |



Fresno County Superior Court
Case No. F91-446252-9
The Honorable John E. Fitch, Judge

# RESPONDENT'S BRIEF TO APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

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On November 24, 2008, this Court granted appellant leave to file a supplemental opening brief. Respondent submits the following in response.

## INTRODUCTION

Appellant, charged with capital murder, raised a diminished actuality defense and an insanity defense at trial. Upon the District Attorney's request, the trial court ordered appellant to submit to evaluations by prosecution retained mental health professionals. Appellant now challenges that court order. Respondent submits that the claims now raised concerning or relating to the trial court order should be deemed forfeited, and that any error arising from the order was harmless.

The issues raised in appellant's supplemental opening brief are based on or relate to this Court's recent decision in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096. In *Verdin*, this Court considered the question:

> [W]hether 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 v. Superior Court, supra*, 43 Cal.4th at p. 1100.) This Court held that, under California's statutes governing discovery in criminal cases, the trial court may not issue such an order. (*Id.* at pp. 1100, 1116.) This Court began its analysis by concluding that such an examination constitutes "discovery" within the meaning of California's statutes governing discovery in criminal cases, namely, Penal Code section 1054 et seq.[1] (*Id.* at pp. 1103-05.) This Court then concluded that the criminal discovery statutes did not authorize the trial court to order the defendant to submit to a mental examination by a prosecution retained expert, simply because the

[1]Hereinafter, all statutory references are to the Penal Code unless otherwise indicated.

defendant had placed his mental state at issue. (*Id.* at pp. 1106-09.) This Court acknowledged that past decisions have held to the contrary. (*Id.* at p. 1106, citing *People v. McPeters* (1992) 2 Cal.4th 1148, *People v. Carpenter* (1997) 15 Cal.4th 312, and *People v. Danis* (1973) 31 Cal.App.3d 782.) However, these decisions did not survive the passage and enactment of the criminal discovery statutes in June of 1990 – Proposition 115. (*Verdin v. Superior Court, supra*, 43 Cal.4th at pp. 1106-07.) Specifically, section 1054, subdivision (e), provides:

> [N]o 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.

This Court further concluded that the examination ordered was neither expressly authorized by any other statute, nor mandated – though permitted – by the United States Constitution. (*Verdin v. Superior Court, supra*, 43 Cal.4th at p. 1116.)[2]

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[2]Respondent notes that on February 27, 2009, a bill was introduced in the California Assembly, seeking to amend section 1054.3 to add the following:

> Whenever a defendant places his or her mental state at the time of the crime in issue by plea or by giving notice of his or her intention to call a mental health expert at trial, the defendant and his or her attorney shall, upon the prosecuting attorney's request, grant access for purposes of a mental health examination of the defendant by the prosecuting attorney's expert. The defendant's or his or her counsel's refusal to do so is admissible as evidence at trial.

(Assem. Bill No. 1516 (2009-2010 Reg. Sess.), § 1.)

## RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

In 1991, the Fresno County District Attorney charged appellant with capital murder. (1 CT 1-5; 2 CT 339-343.)[3] Appellant pled not guilty (2 CT 347; 9/25/91 RT 3-5) and not guilty by reason of insanity (2 CT 502-503; 5/24/03 RT 38-57; 6/4/03 RT 58-70). Pursuant to section 1027, the court appointed two mental health professionals, Dr. Mark Brooks and Dr. Thomas Callahan, to examine appellant. (2 CT 503.)

On October 6, 1993, a jury was empaneled and the guilt phase of the trial began.[4] (3 CT 620-621.) On November 1, 1993, during the prosecution's case-in-chief, appellant gave a notice of intent to present a diminished actuality defense. (3 CT 673-687; see 36 RT 5581-5583.) In response, the District Attorney gave a notice of intent to present mental health evidence in rebuttal, and requested a court order requiring appellant to submit to evaluations by prosecution retained mental health professionals, citing *McPeters*. (3 CT 688-689; 44 RT 7030.) Appellant's trial counsels did not object – in fact, they indicated a willingness to cooperate. (44 RT 7030-7031.)

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[3]"CT" refers to the Clerk's Transcript on Appeal, consisting of seven volumes; "RT" refers to the Reporter's Transcript on Appeal, consisting of eighty-four volumes. The numbers preceding and succeeding CT and RT citations refer respectively to the volume and page numbers. Supplemental Reporter's Transcripts on Appeal for specific proceedings can be identified by the numeric date followed by "RT" – e.g., "9/25/01 RT" refers to the Reporter's Transcript on Appeal for the September 25, 2001, proceedings.

[4]Respondent adds that on June 10, 1993, expressing doubt about appellant's competence to stand trial, the court suspended criminal proceedings and initiated competency proceedings. The court appointed psychiatrist Charles Davis and psychologist Frank Powell to examine appellant. (CT 506-508.) The defense and prosecution retained their own experts, psychiatrist George Woods and psychologist Richard King respectively, and examined appellant. Criminal proceedings resumed following a trial wherein the jury found appellant mentally competent to stand trial. (CT 568.)

Following the prosecution's case-in-chief, appellant presented his diminished actuality defense, which included the testimonies and opinions of psychologist Dr. Paul Berg, neuropsychologist Dr. Ronald McKinzey, and neurologist Dr. Sateesh Apte. (See 45-50 RT.) During the defense's presentation of evidence, prosecution retained mental health professionals met with, interviewed, and evaluated appellant – psychologist Dr. Michael Thackrey on November 28, 1993, and neuropsychologist Bradley Schuyler on November 30, 1993. (See 51 RT 7981, 8240.) On December 7, 1993, defense informed the court that appellant refused to meet with a third prosecution retained mental health professional, psychiatrist Dr. James Missett. (50 RT 7956.) According to appellant's trial counsel:

> [Appellant] has asked us to tell the Court he is not going to be interviewed by anyone else. [¶] He would be willing to go through brainmapping, to have a physical test done on him, or to take a written test, but he will not be questioned anymore. And these are his exact words to me as: "Look, they're trying to kill me, and they want me to sit there with them for two or three hours and answer their questions. I just can't do it. And then they're going to get up on the stand and say I'm lying or making it up." [¶] That's basically where he's coming from and not his exact words. Those are his concerns. So he will not be cooperating with Dr. Missett unless Dr. Missett is going to come in and give him brainmapping or some kind of physical exam.

(50 RT 7956-7957.) Appellant's trial counsel then added:

> We'll stipulate in front of the jury Dr. Missett can come in here and say, "I'm sorry, I will not talk to you," whatever way [the District Attorney] wants to do it.

(50 RT 7957-7957.) The District Attorney sought to confirm: "If [there is] an oral interview that [Dr. Missett] desires, there is a stipulation that [appellant] refuses to do that?" (50 RT 7959.) The court and appellant's trial counsel confirmed: "That's correct." (50 RT 7959.)

Dr. Schuyler and Dr. Thackrey testified as prosecution rebuttal witnesses on December 8, 9, and 10, 1993. (See 51 RT 7961-8089; 52 RT 8186-8262; 53 RT 8388-8438.) On December 10, 1993, the District Attorney called Dr. Missett as a rebuttal witness. (53 RT 8275.) As stipulated, defense stated the following in the presence of the jury:

> [T]he defense would enter into a stipulation that Dr. Missett . . . wanted to interview [appellant]. [Appellant] declined to be interviewed. [Appellant] indicated that he would take any physical exams, written test, or any qualified EEG exam, but that he would not be interviewed further by people trying to kill him. And the interview was to take place last night, and we were asked about it earlier this week.

(53 RT 8284.)

On January 4, 1994, the jury found appellant guilty of capital murder. (4 CT 1086-1094; 61 RT 9404-9439.)

Prior to the start of the sanity phase of the trial, the District Attorney renewed his request to have Dr. Missett examine appellant. (61 RT 9464.) Appellant's trial counsel reiterated that appellant did not want to be examined by prosecution retained mental health experts. (61 RT 9464-9465.) On January 12, 1994, the sanity phase of the trial began with the same jury. (4 CT 1097.) Dr. Berg was the sole witness for the defense. (62 RT.) The District Attorney called Dr. Missett (63 RT 9642) and court appointed psychologist Dr. Brooks (63 RT 9684). The District Attorney elicited testimony from Dr. Missett that "[appellant] refused to meet with him and be evaluated or interviewed." (63 RT 9646.)

On January 20, 1994, the jury found appellant sane during the commission of the offenses. (4 CT 1107-1111, 1113-1120; 65 RT 9947-9960.)

## ARGUMENTS

### I. THE COURT ORDER REQUIRING APPELLANT TO SUBMIT TO EVALUATIONS BY PROSECUTION RETAINED EXPERTS WAS CONTRARY TO *VERDIN*; THIS ERROR, HOWEVER, WAS HARMLESS

Appellant argues that the trial court order – during the guilt phase – requiring appellant to submit to evaluations by prosecution retained mental health experts violated section 1054 et seq. (SB 5-7.)[5] Respondent concedes the trial court's order was contrary to this Court's recent opinion in *Verdin*. The error was harmless however.

Assuming this claim is not deemed waived or forfeited (see Argument V), appellant has not demonstrated that the statutory error here warrants reversal. The *Verdin* decision was based on an interpretation of section 1054 et seq. (*Verdin v. Superior Court, supra*, 43 Cal.4th at pp. 1102, 1115.) Requiring a defendant to submit to examination by prosecution retained experts, where – as here – the defendant places his mental state at issue, does not violate any constitutional right or protection afforded to the defendant. (See *Buchanan v. Kentucky* (1987) 483 U.S. 402, 421-25; compare with *Estelle v. Smith* (1981) 451 U.S. 454 and *Powell v. Texas* (1989) 492 U.S. 680.) A violation of California reciprocal discovery is subject to harmless error review on appeal, under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836: whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13.)

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[5]"SB" refers to Appellant's Second Supplemental Opening Brief.

> Appellate review under *Watson* . . . focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.

(*People v. Breverman* (1998) 19 Cal.4th 142, 177, italics in original.)

Here, appellant testified at trial – his trial counsels had urged him to testify (19 RT 2853-2855, 36 RT 5580-5581). His testimony was essentially the same as the statements he gave to the defense retained experts. Appellant's trial testimony began on November 9, 1993. (37 RT.) The District Attorney cross-examined appellant, and appellant's testimony concluded on November 22, 1993. (43 RT.) The prosecution experts interviewed appellant on November 28 and 30, 1993; and they did not testify until December 8 and 9, 1993. The prosecution experts were therefore privy to appellant's testimony and could have considered his testimony in forming their opinions.

Moreover, that appellant strangled the girls was not disputed. The defense psychiatric theory – that appellant had organic personality syndrome, and he suffered a rage reaction that night that rendered his brain "unconscious" – was simply not supported by the physical and testimonial evidence. The evidence showed appellant's behavior that night was rational, goal-directed, interactive, and extended rather than brief and disoriented. The error in compelling appellant to submit to examination by prosecution retained experts was harmless.

Appellant's claim should be rejected.

## II. SECTION 1027 PROVIDES AUTHORITY FOR THE TRIAL COURT TO COMPEL APPELLANT TO SUBMIT TO EXAMINATION BY PROSECUTION EXPERTS

Appellant argues that the trial court order – prior to the start of the sanity phase – requiring appellant to submit to evaluations by prosecution retained Dr. Missett violated section 1027. (SB 8-9.) Respondent disagrees.

### A. *Verdin* Does Not Preclude Mental Examinations Under Section 1027

The *Verdin* opinion expressly left open the question whether a statutory basis exists, in criminal cases involving a plea of not guilty by reason of insanity, for the court to order that a defendant submit to an evaluation by prosecution retained experts. (*Verdin v. Superior Court, supra*, 43 Cal.4th at p. 1108, fn. 4, citing § 1027 and *People v. Coddington* (2000) 23 Cal.4th 529, 611-12, overruled on other grounds in *Price v. Superior Court* (2001) 26 Cal.4th 1046, 1069.) Assuming this claim is not deemed waived or forfeited (see Argument V), respondent submits: sanity proceedings are governed by the statutory scheme set forth in sections 1026 and 1027; section 1027 contemplates and provides authority for the trial court to compel appellant to submit to examination by prosecution experts; and therefore, there is "express statutory provision" authorizing such discovery, as required by section 1054, subdivision (e).

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 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 language of section 1027, subdivision (a), mentions only court appointed experts examining the defendant. Yet, the Legislature clearly contemplated the parties retaining their own experts to battle over the defendant's mental state. Section 1027, subdivision (d), reads, in part:

> 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; . . ..

(See *People v. Caylor* (1968) 259 Cal.App.2d 191, 198 ["[I]t was proper for the People to call Dr. McNeil as a prosecution witness whether or not there was then outstanding a valid appointment of him as an expert witness under [] section 1027. Expert witnesses on the issues of diminished capacity and legal sanity at criminal trials are not limited to those appointed by the court pursuant to [] section 1027."]; see also Evid. Code, § 733.) Allowing for the parties to retain their own experts and battle over disputed issues certainly conforms with – is a defining characteristic of – our adversarial truth finding process in the criminal justice system.

Respondent acknowledges that section 1027, subdivision (d), makes no mention of whether the defendant may be compelled to an examination by prosecution retained experts. And undoubtedly, as this Court noted, the prosecution experts will have access to relevant written or recorded statements of the defense expert, and "can challenge the defense expert's professional qualifications and reputation, as well as his perceptions and thoroughness of preparation." (*Verdin v. Superior Court, supra*, 43 Cal.4th at pp. 1115-16.) It is difficult, however, to imagine that under section 1027 the Legislature intended for the parties to be able to retain experts but to allow the defense to deny the prosecution's experts access to the individual

whose mental status is at issue. (Compare with *Centeno v. Superior Court* (2004) 117 Cal.App.4th 30, 40 and *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 489-90.)

In *Centeno*, a defendant sought to avoid the death penalty by seeking to show he was mentally retarded.[6] A defense retained expert opined that defendant was mentally retarded, and the expert's opinion was communicated to the prosecution and the trial court. The prosecution disputed the defense claim of mental retardation, and asked the trial court to allow its expert to examine the defendant. The trial court ordered the defendant to submit to examination by the prosecution expert. The defendant challenged, among other things, the court's authority to order him to submit to the examination. (*Centeno v. Superior Court, supra*, 117 Cal.App.4th at pp. 36-37.) The intermediate court of appeal interpreted section 1376[7] to provide such authority – despite language of "the court . . . appoint[ing] . . . qualified experts":

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[6]See *Atkins v. Virginia* (2002) 536 U.S. 304.

[7]Section 1376, subdivisions (b)(1) & (2), provides in part:

(b)(1) In any case in which the prosecution seeks the death penalty, the defendant may, at a reasonable time prior to the commencement of trial, apply for an order directing that a mental retardation hearing be conducted. Upon the submission of a declaration by a qualified expert stating his or her opinion that the defendant is mentally retarded, the court shall order a hearing to determine whether the defendant is mentally retarded.

. . .

(2) For the purposes of the procedures set forth in this section, the court or jury shall decide only the question of the defendant's mental retardation. The defendant shall present evidence in support of the claim that he or she is mentally retarded. The prosecution shall present its case regarding the issue of whether the defendant is mentally retarded. Each party may offer rebuttal evidence. The court, for good cause in furtherance of justice, may permit either party to reopen its case

(continued...)

> [S]ection 1376 expressly authorizes the trial court to appoint experts and permit examination of the defendant by experts for the purpose of producing evidence at the hearing to determine whether the defendant is mentally retarded. [Citation.] Although this statute does not expressly provide for pretrial examination of a defendant by the prosecution, it impliedly contemplates constitutional procedures necessary to ensure a fair trial.

(*Centeno v. Superior Court, supra*, 117 Cal.App.4th at p. 40; see also *In re Hawthorne* (2005) 35 Cal.4th 40, 45, 50.) This Court in *Verdin* did not overturn *Centeno*. In discussing *Centeno*, this Court said:

> Because section 1376, subdivision (b)(2), authorized the trial court . . . to appoint an expert to examine the defendant, the discovery order in that case was authorized by an "express statutory provision," as required by section 1054, subdivision (e).
> [T]he examination[] in [*Centeno*] [was] permissible not simply because the defendant[] placed [his] mental state[] in issue by claiming [he] [was] mentally retarded, but because the proceedings were governed by statutory and constitutional considerations that are inapplicable to the instant case.

(*Verdin v. Superior Court, supra*, 43 Cal.4th at pp. 1105, 1108.)

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(...continued)

> to present evidence in support of or in opposition to the claim of retardation. Nothing in this section shall prohibit the court from making 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. No statement made by the defendant during an examination ordered by the court shall be admissible in the trial on the defendant's guilt.

Similarly, in *Baqleh*, the intermediate court of appeal held that section 1369,[8] in the competency context, provided the trial court with authority to compel the defendant to submit to an evaluation by prosecution retained experts. Though section 1369 speaks only of court appointed experts, the Baqleh court explained:

> 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 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 v. Superior Court, supra*, 100 Cal.App.4th at p. 490; see also *Seng v. Commonwealth* (Mass. 2005) 839 N.E.2d 283, 541-542.)

Section 1027, like sections 1376 and 1369, addresses the defendant's mental state. All three sections speak only of court-appointed experts. Yet, the courts have construed sections 1376 and 1369 to extend authority to the

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[8]Section 1369 provides, in part:

> A trial by court or jury of the question of mental competence shall proceed in the following order: (a) The court shall appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. In any case where the defendant or the defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists, licensed psychologists, or a combination thereof. One of the psychiatrists or licensed psychologists may be named by the defense and one may be named by the prosecution. The examining psychiatrists or licensed psychologists shall evaluate the nature of the defendant's mental disorder, if any, the defendant's ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner as a result of a mental disorder . . ..

trial court to compel the defendant to submit to examination by prosecution experts – that is, to allow pretrial discovery of evidence pertaining to the defendant's mental state. Section 1027 should be no different.

Clearly, the Legislature intended to subject a defendant to a psychiatric examination where the defendant places his sanity at issue. Such an examination is constitutionally permissible because, by placing his sanity at issue, the defendant is deemed to have waived his privilege against self-incrimination. There is no good reason why the Legislature would contemplate the parties retaining their own psychiatric experts and producing their expert evidence, but limit access to the individual whose mental status is at issue to court appointed experts.

Without full access to the defendant, the prosecution would be placed at a significant disadvantage in challenging the opinions of the defense retained experts, as well as any court appointed experts. The United States Supreme Court has said: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." (*Daubert v. Merrell Dow Pharmaceutical, Inc.* (1993) 509 U.S. 579, 595.) Specifically, the United States Supreme Court has observed that "[p]sychiatry is not . . . an exact science." (*Ake v. Oklahoma* (1985) 470 U.S. 68, 81; see also *Addington v. Texas* (1979) 441 U.S. 418, 430 ["Psychiatric diagnosis . . . is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician."].) Mental state issues can be and often are complex. The testimonies of psychiatrists can be crucial. Juries, lay people, remain the fact-finders and must resolve differences in opinion within the psychiatric profession. Without the opportunity to interview the defendant, the value and weight of the prosecution expert's psychiatric diagnosis would be diminished. Having raised a mental state defense, the defense should not be permitted to deny the prosecution's experts access to the individual whose mental state

is at issue. The prosecution expert cannot effectively challenge the defense, or court-appointed, expert's opinion. Nor can the prosecution expert come to a reliable conclusion of the defendant's mental state.

> Ordinarily the only effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony; . . . "[t]he basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject."

(*United States v. Byers* (D.C. Cir. 1984) 740 F.2d 1104, 1114, citation omitted.) "Like a house built on sand, the expert's opinion is no better than the facts on which it is based." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618, citation omitted.) Moreover, the prosecution would need to overcome the perception or belief that the court appointed expert is neutral and objective – or at least more neutral and objective than the parties' experts. (See Evid. Code, § 722; see, e.g., *People v. Bolden* (2002) 29 Cal.4th 515, 552 ["[I]nformation that a party retained an expert is relevant to the possible bias of that expert."]; *Davis v. KGO-TV, Inc.* (1998) 17 Cal.4th 436, 440-41 ["[W]here . . . an [expert] is not appointed by the court but is employed by one of the parties, 'the temptation to act in the interest of such party must be apparent' . . .."].)

It is significant that at the time of the enactment of Proposition 115, sections 1027 and 1369 were in the Penal Code. The electorate was presumably aware of sections 1027 and 1369, when it enacted section 1054 et seq. Yet, the electorate did not repeal those sections. Whether a statute is enacted by the Legislature or through the initiative process, the "adopting body is presumed to be aware of existing laws . . .." (*In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11.)

> [T]he law shuns repeals by implication. . . . The presumption against implied repeal is so strong that, [t]o overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to

> maintain the integrity of both statutes if the two may stand together. . . . Courts have also noted that implied repeal should not be found unless the later provision gives *undebatable evidence* of an intent to supersede the earlier . . ..

(*People v. Hazelton* (1996) 14 Cal.4th 101, 122. italics in original, citations and quotations omitted.) Since sections 1054, 1027, and 1369 are not irreconcilable, in that sections 1027 and 1369 apply to specific situations, it is presumed sections 1027 and 1369 are still good law.

This Court should not interpret "express" authorization under section 1054, subdivision (e), to require explicit statutory language addressing every conceivable discovery request. Neither the Legislature nor the electorate enacting an initiative such as section 1054 have that kind of foresight. Nor is the legislative institution or initiative process adept at making decisions case-by-case. What is important for purposes of section 1054, subdivision (e), is that the authorization is not based on "inherent" court authority – a vague and amorphous concept, undefined in scope. (Compare with *People v. Danis, supra*, 31 Cal.App.3d at pp. 786-87 ["[E]ven in the absence of an authorizing statute, a trial court possesses the inherent power to order a defendant who has imposed a defense of insanity or of diminished capacity to submit to an examination of a psychiatrist selected by the People."], *United States v. McSherry* (2d Cir. 2000) 226 F.3d 153, 156 ["Those facts justify an exercise of inherent powers. Before the promulgation of any rules on the matter, we held that if the defense relies on expert testimony as to the defendant's mental state, it is estopped from depriving the government of an opportunity to examine the defendant."], and *United States v. Baird* (2d Cir. 1969) 414 F.2d 700, 710 ["[A]uthority to permit the Government to examine the accused . . . stems from the inherent power of the courts in criminal cases."].) Rather, the court order in this case was based on an explicit statutory authorization.

### B. Any Error Under *Verdin* Was Harmless

Regardless, even assuming section 1027 does not provide authorization to the trial court to compel appellant to submit to evaluation by prosecution expert Dr. Missett, the error was harmless. During a *Marsden*[9] hearing, appellant's trial counsel, Barbara O'Neill, informed the court that she disagreed with the plea of not guilty by reason of insanity, noting the lack of evidence to support such a defense: none of the eight mental health experts who had examined appellant found him insane. (19 RT 3029-3031, 3033.) While the jury was unaware of this, respondent merely wishes to highlight the implausibility of appellant's diminished actuality and insanity defenses: appellant had organic personality syndrome; he suffered a rage reaction that rendered his brain "unconscious." An insanity defense was simply not supported by the physical and testimonial evidence. Again, the evidence showed appellant's behavior that night was rational, goal-directed, interactive, and extended rather than brief and disoriented.

Accordingly, appellant's claim should be rejected.

## III. THE STIPULATION ABOUT APPELLANT'S REFUSAL TO BE INTERVIEWED BY DR. MISSETT WAS HARMLESS

Appellant argues that the stipulation concerning his refusal to be interviewed by Dr. Missett was improper. (SB 10.) The comments were harmless.

At the guilt and sanity phases, there was mention by stipulation of appellant's refusal to be interviewed by prosecution expert Dr. Missett. (See 53 RT 8284, 63 RT 9646.)

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[9] *People v. Marsden* (1970) 2 Cal.3d 118.

As respondent argued above, the trial court has express statutory authority in sanity proceedings to compel appellant to submit to examination by prosecution experts. (Argument II; see § 1027.) Moreover, appellant's constitutional privilege against self incrimination was not violated because he was deemed to have waived the privilege by raising the insanity defense. (*Buchanan v. Kentucky, supra*, 483 U.S. at pp. 421-25.) Commenting on appellant's refusal to be interviewed by Dr. Missett was therefore not improper in the sanity phase of the trial. (*People v. Coddington, supra*, 23 Cal.4th at pp. 611-12.)

As to the guilt phase, though appellant was deemed to have waived his privilege against self-incrimination by raising the diminished actuality defense, there was, according to *Verdin*, no statutory authorization or constitutional mandate that he be examined by prosecution experts. Consequently, assuming the claim here is not waived or forfeited, respondent concedes that commenting on his refusal to be interviewed by Dr. Missett in the guilt phase was improper. (Cf., *People v. Wallace* (2008) 44 Cal.4th 1032, 1087.) A defendant should not be placed in the dilemma of whether to forgo his statutory right and be evaluated by a prosecution expert, or decline evaluation and risk negative inferences for his refusal.

This stipulated comment on appellant's refusal to be interviewed by Dr. Missett had little, if any, effect on the jury. That is, it was harmless. In respondent's view, if anything, the stipulated comment, read in whole and in light of the attendant circumstances, actually inured to appellant's benefit. Appellant had taken the stand and testified. The jurors knew he had submitted to numerous psychiatric evaluations, including two conducted by prosecution experts Dr. Schuyler and Dr. Thackrey. The stipulated comment, instead of suggesting that appellant had something to hide, highlighted the interest and goal – and bias – of the prosecution and its experts, to seek the death penalty. Moreover, the stipulated comment

emphasized that he was willing to submit to nontestimonial exams. By doing so, appellant emphasized the subjective nature of psychiatric diagnosis and conveyed his fear of prosecution experts' ability to manipulate his words and recollections. It is not reasonably probable that this stipulation, crafted argumentatively in appellant's favor, prejudiced appellant.

Accordingly, appellant's claim should be rejected.

## IV. APPELLANT WAIVED HIS CLAIM THAT THE JURY SHOULD HAVE BEEN INSTRUCTED WITH FORMER CALJIC NO. 2.10; REGARDLESS, THE OMISSION OF SUCH A LIMITING INSTRUCTION WAS HARMLESS

Appellant argues that the court should have instructed the jury with former CALJIC No. 2.10. (SB 11-12.) This claim should be deemed waived or forfeited because appellant's trial counsel did not request the limiting instruction.

Former CALJIC No. 2.10, entitled "Statements Made by Defendant to Physician," provides:

> There has been admitted in evidence the testimony of a medical expert of statements made by the defendant in the course of an examination of the defendant which were made for the purpose of [diagnosis] [treatment]. These statements may be considered by you only for the limited purpose of showing the information upon which the medical expert based [his] [her] opinion. This testimony is not to be considered by you as evidence of the truth of the facts disclosed by defendant's statements.

In the absence of a request, the court is under no duty to instruct the jury sua sponte that what a defendant told experts was only to show the basis for the experts' opinions. (*People v. Cantrell* (1973) 8 Cal.3d 672, 683, overruled on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 324-25, and *People v. Flannel* (1979) 25 Cal.3d 668, 685, fn.12; accord,

*People v. Boyer* (2006) 38 Cal.4th 412, 465.) The record does not disclose such a request.

There was a sound reason why appellant's trial counsel would not request such a limiting instruction. The defense did not want the jury simply to believe appellant's statements were the basis of an expert's opinion. The defense wanted the jury to consider his statements for the truth of the matter asserted – to believe that he exploded with rage, and that he could not remember much after his rage reaction. Appellant's recollections – or lack of recollections – supported the defense psychiatric diagnosis of organic personality syndrome, and theory of rage reactions that rendered his brain "unconscious."

Moreover, an instruction limiting how the jurors could consider appellant's statements to the interviewing experts would have had little or no effect. Appellant testified at trial. His testimony was essentially the same as the statements he gave to the interviewing experts. The omission of former CALJIC No. 2.10 was harmless. (*People v. Cantrell, supra*, 8 Cal.3d at p. 683.)

Accordingly, appellant's claim should be rejected.

## V. APPELLANT'S CLAIMS RAISED SHOULD BE DEEMED WAIVED OR FORFEITED

Appellant argues that the lack of an objection under section 1054 et seq. should not waive or forfeit the claims of error now raised in his second supplemental brief. (SB 13-14.) Respondent disagrees.

Undoubtedly, the law changed with the passage and enactment of Proposition 115. (See *Verdin v. Superior Court, supra*, 43 Cal.4th at pp. 1100, 1106.)

> In determining whether the significance of a change in the law excuses counsel's failure to object at trial, [this Court] consider[s] the "state of the law as it would have appeared to competent and knowledgeable counsel at the time of the trial."

(*People v. Black* (2007) 41 Cal.4th 799, 811 [holding that, in sentencing proceedings preceding the United States Supreme Court decision in *Blakely v. Washington* (2004) 542 U.S. 296, a claim of sentencing error premised upon the principles established in *Blakely* and *Cunningham v. California* (2007) 549 U.S. 270 is not forfeited on appeal by counsel's failure to object at trial].) This Court – prior to the District Attorney's request to have appellant examined by prosecution experts – has emphasized that the passage and enactment of Proposition 115 limited the court's authority to grant discovery. (See *In re Littlefield* (1993) 5 Cal.4th 122, 129 ["In criminal proceedings, under the reciprocal discovery provisions of section 1054 et seq., all court ordered discovery is governed exclusively by – and is barred except as provided by – the discovery chapter newly enacted by Proposition 115."]; see also *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1313 ["[U]nless a requested item is authorized by other statutes or is constitutionally required, the parties to a criminal proceeding are entitled to obtain disclosure of only those items listed in sections 1054.1 and 1054.3."].) And as this Court indicated in *Verdin*, the court and the legislature have considered that a mental examination could be a form of pretrial discovery. (*Verdin v. Superior Court, supra*, 43 Cal.4th at p. 1104, citing *Ballard v. Superior Court* (1966) 64 Cal.2d 159 and Code of Civil Proc., § 2032.020, subd. (a); see, e.g., *Centeno v. Superior Court, supra*, 117 Cal.App.4th at p. 41.)

Though the *McPeters* opinion – reiterating the trial court's authority to compel examination by prosecution exerts where a defendant places his mental state at issue – was issued in 1992, the *McPeters* trial occurred prior to the passage of Proposition 115, some time in the mid-1980s. Moreover,

the *McPeters* court did not state the basis for such authority. The *McPeters* court simply held that exercise of such authority did not violate the defendant's constitutional rights. (*People v. McPeters, supra*, 2 Cal.4th at p. 1190.) As *Danis* and many federal court cases stated, such authority was based on the trial courts' "inherent power to develop rules of procedure aimed at facilitating the administration of criminal justice and promoting the orderly ascertainment of the truth." (*People v. Danis, supra*, 31 Cal.App.3d at p. 786.) The language of section 1054, subdivision (e), was clear. There was a valid argument that discovery ordered pursuant to the trial courts' inherent power – in the absence of statutory or constitutional authority – was no longer permissible. A reasonable and competent counsel could have made and should have been expected to make such an argument.

Regardless, even if appellant was deemed to have waived or forfeited the claims here, to forestall any claim of ineffective assistance of trial counsel, respondent stresses that the errors alleged here were individually and cumulatively harmless. (See arguments I, II, III, IV, and VI.) Moreover, respondent emphasizes that the defense did not begrudgingly submit to evaluations by prosecution retained mental health professional. As noted earlier, appellant's trial counsels expressed willingness to cooperate with the prosecution retained mental health professionals. (44 RT 7030-7031.)

## VI. THE ERRORS WERE HARMLESS INDIVIDUALLY AND CUMULATIVELY

Appellant argues that the errors were individually and cumulatively prejudicial. (SB 15-17.) Not so. The cumulative effect of multiple errors may constitute a miscarriage of justice. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1236; *People v. Holt* (1984) 37 Cal.3d 436, 458-59.) Though ordering appellant to submit to mental examination by prosecution experts in the guilt phase and commenting on his refusal to be interviewed by one of the prosecution experts were improper, these errors individually and cumulatively were harmless. As stressed above, there was no violation of any constitutional right or protection afforded to appellant. The errors were of state law, section 1054 et seq, to be reviewed under the standard articulated in *Watson*. (*People v. Zambrano, supra*, 41 Cal.4th at p. 1135, fn. 13.) Appellant had taken the stand and testified. His testimony was essentially the same as the statements he gave to the defense retained experts. The defense experts testified and noted what appellant told them. As noted earlier, the prosecution experts were privy to appellant's testimony and could have considered his testimony in forming their opinions. Moreover, appellant's diminished actuality and insanity defenses were simply not supported by the physical and testimonial evidence. Again, the evidence showed appellant's behavior that night was rational, goal-directed, interactive, and extended rather than brief and disoriented.

Accordingly, his claim should be rejected.

## CONCLUSION

Accordingly, for the reasons stated here, as well as the reasons previously asserted in the Respondent's Brief, respondent respectfully asks that the judgment be affirmed.

Dated: March 20, 2009.

Respectfully submitted,

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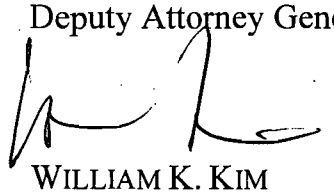

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## CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF TO APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF** uses a 13 point Times New Roman font and contains 5,747 words.

Dated: March 20, 2009.

EDMUND G. BROWN JR.
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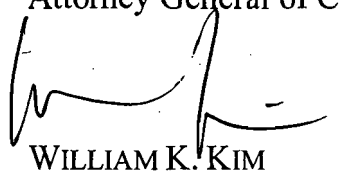

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## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Clark***
Case No.: **S045078**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 20, 2009, I served the attached **Respondent's Brief to Appellant's Second Supplemental Opening Brief** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, California 93721, addressed as follows:

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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 March 20, 2009, at Fresno, California.

Debra Pereira-Young
Declarant

Debra Pereira-Young
Signature