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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

REPLY BRIEF ON THE MERITS

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

The district attorney argues that the Legislature intended the amendment to "operate alongside" the existing provisions of law addressing sanity proceedings. (Answer, at p. 9.) However, if that was its unstated intent, the Legislature simply used the wrong language and failed to accomplish that goal. The district attorney also suggests this conclusion is based upon a right to "pursue justice for victims" (*id.*, at p. 13), however, "the People's strong interest in prosecuting criminals can often be vindicated by challenging the defense in other ways." (*Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1116.) Petitioner respectfully submits this reply brief on the merits:

THE ISSUE PRESENTED IS ONE OF LAW

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?

PETITIONER'S 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. The amendment does not "operate alongside" section 1027.[1]

Discussion

I.

The process and procedures regarding court-ordered examinations of criminal defendants in sanity proceedings are addressed by existing provisions of law which are unaffected by Penal Code section 1054.3, subdivision (b), as amended effective January 1, 2010.

Penal Code section 1027 was enacted in 1927 to require the court to appoint expert witnesses to investigate the defendant's mental status in any case in which a defendant entered a plea of not guilty by reason of insanity.

These experts were originally referred to as "alienists," but that term was replaced by the term "psychiatrists" in 1965. As amended in 1978, the statute now permits the appointment of either psychiatrists or psychologists. When a defendant

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

pleads not guilty by reason of insanity, the court must select and appoint two psychiatrists or licensed psychologists, and may appoint three. The minimum qualifications of these experts are specified. Their initial duties are to examine the defendant and investigate his or her mental status. The experts must investigate "the psychological history of the defendant, the facts surrounding the commission of the acts forming the basis for the present charge used by the psychiatrist or psychologist in making his examination of the defendant, and the present psychological or psychiatric symptoms of the defendant, if any." (§ 1027, subd. (b).)

The experts are entitled to traveling expenses and fees fixed by the court and paid by the county. (§ 1027, subd. (a); see *People v. Strong* (1931) 114 Cal.App. 522 [the existing provisions are valid]; *People v. Panah* (2005) 35 Cal.4th 395, 435 [court has discretion to deny a defense motion to appoint a third expert].)

The psychiatrists or psychologists must testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question. (§ 1027, subd. (a).) They may be called by the prosecution, the defense, or the court itself. (§ 1027, subd. (e).) Nothing in the existing provisions of law makes their testimony essential to the trial if neither the parties nor the court elects to call them. (*People v. Richardson* (1961) 192 Cal.App.2d 166, 171.)

The qualifications of a court-appointed psychiatrist or psychologist are determined in the same manner as those of any other expert witness, i.e., the expert is "subject to all legal objections as to competency and bias and as to qualifications as an expert." (§ 1027 subd. (e).) If the court or the opposing party calls the expert, the expert may be cross-examined as an adverse witness. (*Ibid.*)

An expert appointed under section 1027 is not appointed as an agent of the defense attorney, but of the court, so communications made by the defendant to the psychiatrist are not made in confidence, and the psychiatrist may testify as to the results of the examination.

Section 1027 does not mandate that a psychiatrist or psychologist form and offer an opinion whether a defendant was sane or insane at the time of the offense. A

1981 amendment specifies that the "section does not presume that a psychiatrist or psychologist can determine whether a defendant was sane or insane at the time of the alleged offense." (§ 1027, subd. (c).)

Although both parties may also retain and call other mental health experts, expert witnesses called by the prosecution are only entitled to the witness fees allowed by the court. (§ 1027, subd. (d).) A defendant need not retain anyone and may often lack the funds to do so.

Petitioner submits that these existing provisions are adequate and work well for determining whether a defendant was sane or insane at the time of the commission of the unlawful act. But whether the scheme could be improved upon is a question that is not before this court. Within constitutional limits, the Legislature is free to amend the existing provisions of law that address the adjudication of insanity should they choose to do so. But these provisions are expressly left unaffected by Penal Code section 1054.3, subdivision (b), as amended effective January 1, 2010.

II.

The phrase "*[u]nless otherwise specifically addressed by an existing provision of law*" in Penal Code section 1054.3(b) clearly indicates the limited scope and application of the amendment, whose sole purpose was to respond to the decision in *Verdin v. Superior Court.* Statutes should not be "harmonized" by the courts, when the Legislatures expressly declares its intent to leave "existing provisions of law" unaffected.

In *Verdin v. Superior Court, supra,* 43 Cal.4th 1096, Mr. Verdin noticed his intention to rely on a diminished actuality defense against the charge of premeditated and deliberate attempted murder. The only issue before this Court on review was whether an order directing the defendant to submit to a mental examination by a prosecution-retained expert was a form of "discovery" authorized by the criminal discovery statutes. This court held that such an order was a form of unauthorized discovery. (*Id.*, at p. 1116.)

Verdin did not involve a plea of not guilty by reason of insanity, and this Court's decision in that case did not alter existing provisions of law addressing court-ordered examinations of criminal defendants in sanity proceedings.

The Legislatures response to the *Verdin* decision also did not alter the existing procedures in cases that involve a plea of not guilty by reason of insanity, because nothing in *Verdin* called for such a response. The Legislature's response was carefully limited and measured to apply only to cases which did not involve an insanity plea. Because that scheme was not viewed as broken by anything in *Verdin*, there was nothing for the Legislature to fix.

CONCLUSION

The District Attorney's answer brief on the merits fails to adequately explain which "existing procedures of law" preclude application of the 2010 amendment. The Legislature could have said "*this amendment is intended to operate alongside other existing provisions of law addressing court-ordered examinations of criminal defendants in sanity proceedings, such as Penal Code section 1027*," but it chose not to do so. It remains free to amend the statute again, should it conclude the time and expense caused by additional examining experts would be well spent and worthwhile. But such a conclusion is far from automatic, in a time when the state and counties lack money for courts, schools, and public health.

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As it did in *Verdin*, this Court should again defer to the Legislature. Statutes should not be "harmonized" by the courts, when the Legislature expressly declares its intent to leave "existing provisions of law" unaffected.

Dated: July 25, 2011.

Respectfully Submitted,

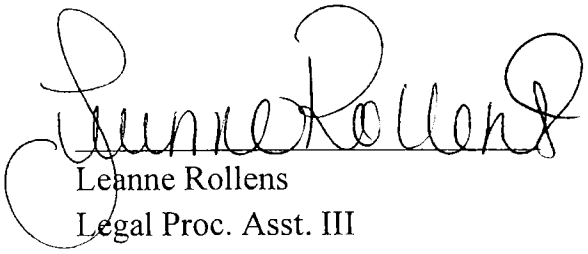
STEPHEN P. LIPSON,
Public Defender

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 2000 words in Times New Roman 13 pt. font in this document, excluding Declaration of Service.

Dated: July 25, 2011.



Leanne Rollens
Legal Proc. 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 July 25, 2011, I, Leanne Rollens, 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: **REPLY BRIEF ON THE MERITS:**

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

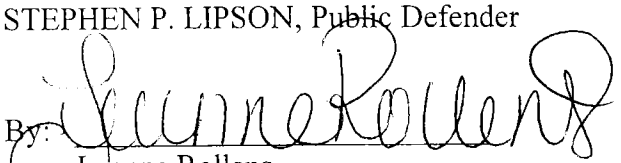
Hon. Kevin G. DeNoce, Judge AND
Michael Planet, Exec. Officer, Superior Court
800 S. Victoria Avenue, 2nd Flr HOJ
Ventura, CA 93009
(Trial Judge)

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 **REPLY 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, 2nd Dist., Div. 6, 200 E. Santa Clara St., Ventura, CA 93001; Hon. Kamala Harris, Atty. General, 300 S. Spring St. 5th Flr/N Twr, Los Angeles, CA 90013

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

STEPHEN P. LIPSON, Public Defender

By: 
Leanne Rollens
Legal Proc. Asst. III