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*Digest: Verdin v. Superior Court*

*Ryan D. Chavez*

Opinion by Werdegar, J., expressing the unanimous view of the Court.

Issue

Did the trial court err in ordering a criminal defendant, who declared the intention of raising a diminished actuality defense to a charge of attempted murder, to submit to a mental examination conducted by an expert retained by the prosecution?

Facts

Petitioner was charged with the premeditated attempted murder of his wife and several related offenses.<sup>1</sup> He notified the prosecution of his intention to claim a diminished actuality defense—producing a report of his psychological evaluation in support.<sup>2</sup> Petitioner denied the prosecution's informal request to conduct a separate medical examination by its own expert.<sup>3</sup> The prosecution moved to compel the examination, alleging that petitioner had waived any objection to it by placing his mental state at issue.<sup>4</sup> The trial court granted the motion.<sup>5</sup> The Court of Appeal affirmed.<sup>6</sup> The Supreme Court granted review and remanded to the Court of Appeal, directing it to vacate its order and issue a new order denying the motion.<sup>7</sup>

Analysis

The Court passed over petitioner's constitutional claims to consider only his argument that the trial court's order violated state law.<sup>8</sup> The Court noted that Proposition 115's amendments to the Penal Code established exclusive procedures for discovery in criminal cases by providing 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

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<sup>1</sup> Verdin v. Superior Court, 183 P.3d 1250, 1253 (Cal. 2008).

<sup>2</sup> *Id.* at 1254.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1254, 1264.

<sup>8</sup> *Id.* at 1254.

the United States."<sup>9</sup> The Court then addressed whether the psychiatric examination fit the language of the statute.<sup>10</sup>

### 1. Is a Mandatory Psychiatric Examination "Discovery"?

The Court rejected the People's argument that a psychiatric examination is not a form of discovery governed by the criminal discovery statutes.<sup>11</sup> The Court agreed that sections 1054.1 and 1054.3 of the Penal Code presume that the evidence to be discovered is already in existence.<sup>12</sup> But the Court found that these statutes did not exclude other forms of discovery.<sup>13</sup> Further, the Court said, psychiatric examinations have been traditionally recognized as valid discovery tools by the courts in criminal cases and by the Legislature in civil cases.<sup>14</sup>

### 2. Do the Criminal Discovery Statutes Authorize a Trial Court to Order a Psychiatric Examination?

The Court then rejected the People's argument that a criminal defendant who places his mental state in issue thereby authorizes a mental examination by a prosecution expert.<sup>15</sup> The Court reasoned that the authorities on which the People relied in support of its position was superseded by Proposition 115, which "did not authorize the judiciary generally to create appropriate rules governing discovery in criminal cases."<sup>16</sup> The Court concluded that its earlier decisions are, therefore, invalid and "untethered to a statutory or constitutional base."<sup>17</sup>

### 3. Is a Court-Ordered Psychiatric Examination Authorized by Some "Other Express Statutory Provision"?

The Court then rejected the People's argument that Evidence Code section 730 and Penal Code section 1054.4 authorized the trial court's order.<sup>18</sup> The Court reasoned that the prosecution failed to preserve its right to appeal whether they forfeited their reliance on Evidence Code section 730, which allows the trial court to appoint an expert to testify as to a matter on which expert evidence may be required, because the expert was appointed by the prosecution and not by the court.<sup>19</sup>

The Court then rejected the People's argument that a psychiatric

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9 *Id.* (citing CAL. PEN. CODE § 1054) ("[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.").

10 *Id.* at 1255.

11 *Id.*

12 *Id.* (citing CAL. PEN. CODE §§ 1054.1, 1054.3).

13 *Id.*

14 *Id.* at 1255-56.

15 *Id.* at 1256-57.

16 *Id.* at 1257-58.

17 *Id.* at 1264.

18 *Id.* at 1259.

19 *Id.* (citing CAL. EVID. CODE § 730).

examination is permissible under Penal Code section 1054.4, which provides for the discovery of “nontestimonial” evidence as permitted by law.<sup>20</sup> The Court reasoned that statements made in a psychiatric examination “would unquestionably be testimonial” under the Supreme Court’s jurisprudence because such statements would be communicative rather than noncommunicative or physical in nature.<sup>21</sup>

#### 4. Is a Court-Ordered Psychiatric Examination “Mandated by the Constitution of the United States”?

The Court said that, while the U.S. Constitution permits trial court to conduct a mental examination of petitioner in these circumstances, nothing in the Constitution *mandates* the trial court’s order.<sup>22</sup>

#### 5. Due Process Under the State Constitution

The Court also found that precluding the trial court from ordering petitioner’s mental examination, while allowing the People to challenge his mental defense more effectively, did not violate the People’s due process rights under the California Constitution.<sup>23</sup> The Court emphasized that the prosecution had ample discovery tools available to prove its case should the petitioner raise that defense at trial.<sup>24</sup>

#### Holding

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.”<sup>25</sup>

#### Legal Significance

This decision provides additional protection for criminal defendants by applying a narrow interpretation of the scope of the criminal discovery statutes. However, this decision may be limited in its effect, as the prosecution is still free to move a trial court to appoint an expert witness under Evidence Code section 730.

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<sup>20</sup> *Id.* (citing CAL. PEN. CODE § 1054.4).

<sup>21</sup> *Id.* at 1260–61.

<sup>22</sup> *Id.* at 1263.

<sup>23</sup> *Id.* (citing CAL. CONST. art. I, § 29).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1264.