this interpretation, a person may still pose an imminent risk of causing harm even when the harm itself is not likely to occur within a defined period of time and the person has no history of violence.

Finally, although all states permit involuntary commitment based on dangerousness, other criteria vary considerably. A recent study found that 16 states allow involuntary commitment to rest on a prediction of future deterioration or relapse of mental illness, with only a portion of these requiring a further link to dangerousness (Brooks RA: Psychiatrists' opinions about involuntary civil commitment: results of a national survey. *J Am Acad Psychiatry Law* 35:219–28, 2007). In eight states, involuntary commitment can be based solely on alcohol dependence and in 11 states solely on drug dependence. In part, such a variety is reinforced by federal courts' tendency to offer states broad latitude in setting civil commitment standards. The success of any challenge to a state's existing commitment criteria, then, rests on a state court's willingness to reconsider the scope of *parens patriae* and police powers. As seen in the present case, this willingness will vary from one justice to another and over time, reflecting the evolving attitudes toward the treatment of persons with mental illness.

Diminished Capacity and the Right to Refuse Mental Examination

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In California, a Trial Court Cannot Order a Criminal Defendant Who Raises a Diminished-Actuality Defense to Submit to a Mental Examination by an Expert Retained by the Prosecution

In *Verdin v. Superior Court*, 183 P.3d 1250 (Cal. 2008), Jose De Jesus Verdin appealed the trial court's decision, requiring him, following his notice of intent to raise a diminished-actuality defense, to submit to a mental examination by an expert retained by the prosecution. The Court of Appeal (4th District) denied mandate relief. Mr. Verdin appealed to the California Supreme Court, which reversed and remanded the case to the Court of Appeal. The court concluded that the ordered examination violates California's criminal discovery statute (*Cal. Penal Code § 1054(e)*) and is not authorized by any other statute or mandated by the Constitution.

Facts of the Case

On January 12, 2004, at approximately 1:40 a.m., police responded to Mr. Verdin's home to find him naked and sitting on his front porch. He voluntarily stated that he had killed his daughter. The police found the home to be in disarray, and one of the officers noticed fresh blood in the bedroom. Police discovered Mr. Verdin's wife in the home, and she appeared to have been beaten up. She reported that her husband had thrown her around the house, and, when she escaped, she heard gunshots that she believed were directed at her. She was not shot. The police found a revolver containing six expended shells in the home. Mr. Verdin's two-year-old daughter was later found to be alive and staying with a neighbor. She appeared to have been beaten around her head and evidenced bruises around her neck as if she had been strangled.

Mr. Verdin was taken into custody, waived his *Miranda* rights, and admitted to assaulting his wife and daughter and attempting to shoot his wife. He stated that he assaulted his wife because he was "mad." In describing the assault on his daughter, he stated that he pressed his knee into the back of her neck, pushed her face into the bed, picked her up by the neck, pulled her hair, choked her, and struck her in the face with a closed fist. He stated that he attacked his daughter because "she wouldn't shut up" and described what he did as "evil." He was subsequently charged with premeditated and deliberate attempted murder, assault with a firearm, willful discharge of a firearm in a grossly negligent manner, corporal injury on a spouse, and felony child endangerment.

Mr. Verdin gave notice to the court of his intention to raise a diminished-actuality defense and he provided to the court a report of an evaluation conducted by a psychiatrist, Dr. Francisco Gomez. The

prosecution sought discovery, including Dr. Gomez's records, notes, and test results as well as "access to your client for purposes of mental examination." The defense did not oppose the request for Dr. Gomez's written materials, but they objected to Mr. Verdin's participation in an evaluation by the prosecution's expert. The prosecution argued that he had "waived any objection to such an examination by placing his mental state in issue" (*Verdin*, p 1254), and based its request on *People v. Carpenter*, 935 P.2d 708 (Cal. 1997). The trial court granted the prosecution's request that Mr. Verdin submit to an examination of his mental state by the prosecution's expert. He appealed to the Court of Appeal on the basis that a mental examination by a prosecution-retained expert is not authorized by state law and that such an examination would violate his rights under both the California and United States Constitutions. His appeal was denied, and the Supreme Court of California granted review.

Ruling

The Supreme Court of California reversed and remanded the case. The court found that California's criminal discovery statutes (*Cal. Penal Code § 1054 et seq*.) do not authorize, and the Constitution of the United States does not mandate, a mental examination of a defendant by the prosecution's expert. The court instructed the Court of Appeal to issue a writ of mandate to the district court, instructing the court to vacate the previous order for the defendant to participate in the evaluation, and to issue a new order that denied the People's motion to obtain the mental examination.

Reasoning

The court first examined relevant California statutes to determine if the evaluation was authorized. In 1990, the California laws governing the rules of discovery were changed when Proposition 115, the Crime Victims Justice Reform Act, was implemented. The proposition authorized reciprocal discovery in criminal cases. *Section 1054* of the proposition stated, "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" (*Section 1054(e)*). To determine whether the examination could be court ordered, the court discussed the following: whether the examination could be classified as discovery, whether the discovery statutes authorize a court to order a mental examination, whether other statutory provisions authorize the examination, and whether the examination is mandated by the U.S. Constitution.

First, the court addressed whether a mandatory mental examination is considered discovery. *Section 1054* describes discovery as providing known information or evidence to the opposing party, and it notes that it does not provide a full list of items that can be considered discovery. The court emphasized that the statute did not exclude other types of information from being considered as part of discovery, but questions were raised about whether mental evaluations fall outside of known information, as they had not yet been conducted. The court concluded that, based on previous case law (*Ballard v. Superior Court*, 410 P.2d 838 (Cal. 1966)), the evaluations have been considered pretrial discovery materials since 1966. Similarly, based on the Code of Civil Procedure, which is part of the Legislature's Civil Discovery Act, the court concluded that because a mental examination is considered a form of discovery in civil cases, it also applies in criminal cases.

After the court determined that mental examinations are a form of discovery, they next turned to whether the statutes authorize the trial court to order an examination. The court concluded that the appropriate statute, *Section 1054* of Proposition 115, does not allow trial courts to order criminal defendants to undergo a mental examination once the defendant raises his mental state as an issue. Cases decided before Proposition 115 had allowed trial courts to order such examinations, but the court determined that those cases could no longer be used as precedent, because they were overridden by the new discovery statutes.

Although *Section 1054* does not allow trial courts to order a mental examination by the prosecution's expert, the prosecution asserted that *California Evidence Code Section 730* does. Specifically, *Section 730* allows the prosecution to request that an expert be appointed by the court. However, because such an expert is the court's expert, not the prosecution's, under this statute the expert would submit the report directly to the court. The Supreme Court of California, however, concluded that *Section 730* did not apply to this case, since the prosecution was not seeking a court-appointed expert, but rather, it was seeking its own expert. The court also found *Section 1054.4*, which allows nontestimonial evidence to be

obtained, inapplicable. It applied the Supreme Court's definition of testimonial (*Fisher v. United States*, 425 U.S. 391 (1976), *Doe v. United States*, 487 U.S. 201(1988)) to the case, concluding that the defendant's participation in the evaluation would be considered testimonial. Therefore, the defendant's Fifth Amendment right to avoid self-incrimination would apply.

Finally, the court looked to the U.S. and California Constitutions. *Section 1054* clearly states that the trial court can order pretrial discovery if it is mandated by the U.S. Constitution, but the U.S. Constitution does not mandate a defendant to undergo a court-ordered evaluation when one chooses to raise a defense based on one's mental state at the time of the crime. In regard to the Constitution of California, the People argued that not allowing the court-ordered examination would violate their right to due process, and indicated "the concept of fundamental fairness" and "meaningful opportunity to be heard" necessitated the appointment of the expert. The court recognized that allowing the prosecution's expert to examine the defendant would most likely assist the prosecution to disprove the defendant's mental state claim. However, the court explained that the prosecution can challenge the defendant's diminished actuality claim by using other tactics, such as challenging the defense expert's credentials and basis for the opinion, as well as have an expert of their own review the materials used by the defense expert and testify on that basis about the defendant's mental state.

Discussion

To understand the context for this case, a brief discussion is warranted about the affirmative defense that Mr. Verdin raised. Two elements of a crime must be present to prove guilt: *actus reus*, or a wrongful act, and *mens rea*, or criminal intent. The legal system has developed different gradations of *mens rea* to describe various levels of culpability (Melton GB, Petrila J, Poythress NG, *et al*: Psychological Evaluations for the Courts (ed 3). New York: The Guilford Press, 2007). In contrast to the all-or-nothing not guilty by reason of insanity (NGRI) defense that negates the *mens rea*, some states allow a defendant to raise a diminished-capacity defense in which the defendant is permitted to introduce evidence to show that mental illness or intoxication lessened his or her capacity to form intent. California, in 1982, abolished the diminished-capacity defense and replaced it with the diminished-actuality defense, which explicitly restricts the admission of evidence about a defendant's mental state "to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act" (*Cal. Penal Code § 28*). Rather, the Penal Code states that evidence of mental disease, defect, or disorder is admissible "solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." Thus, California's diminished-actuality doctrine is not about whether the defendant could have formed the specific intent, as is the question in diminished capacity, but whether he or she did, in fact, form the intent. Because expert witnesses cannot answer this ultimate legal question, their role is more limited under the diminished-actuality doctrine, compared with that under diminished capacity.

In Mr. Verdin's case, the court denied the prosecution's motion for retaining its own expert but suggested that it could request a court-appointed expert. While the court's decision may seem revolutionary by restricting the prosecution from retaining its own expert, the case has limited applicability. The court's decision was based on the interpretation of the specific California discovery statutes, not on constitutional safeguards. Although limited to California, the court's ruling may apply as well to insanity defense cases in California, as the statute dealing with the appointment of experts in insanity cases (*Cal. Penal Code § 1027*) appears to offer no provision for an expert to be retained by the prosecution. The implications of how the expert is retained may not be of significant concern in cases of diminished actuality, given the limited scope of the expert's role, but it may be more problematic for insanity defenses. Specifically, in insanity cases, the focus is on the defendant's mental state at the time of the offense, a matter about which mental health professionals have a great deal to offer the court. In such cases, an evidentiary imbalance may be created if the defense is able to retain its own expert but the prosecution is limited to a court-appointed expert.

It is interesting to contrast the ruling in California with the manner in which similar issues are raised in other states. For instance, Massachusetts courts have

allowed prosecutors to obtain their own expert witnesses in mental health cases. Nonetheless, Massachusetts courts have also recognized the potential risk to defendants of such an arrangement. In *Commonwealth v. Stroyny*, 760 N.E.2d 1201 (Mass. 2002), the Massachusetts Supreme Judicial Court ruled that an expert hired by the prosecution is prevented from sharing with the prosecutor any statements made by the defendant in the course of the examination until such time as the defendant has waived his privilege against self-incrimination (i.e., the defendant enters a plea of not guilty by reason of insanity and indicates that the defense will rely on his or her own statements). These cases demonstrate the focus on preserving defendants' rights in mental health cases, although the procedures and rulings differ greatly between the jurisdictions.

ERISA and Disability Benefits

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Insurance Plan Administrators Are Not Required to Produce Medical Reports Requested by the Claimant During the Pendency of the Disability Review and Description of Functional Impairments Are Used for Disability Determinations

In *Glazer v. Reliance Standard Life Insurance Company*, 524 F.3d 1241 (11th 2008), the Eleventh Circuit Court of Appeals examined whether the district court for the Southern District of Florida had erred in its summary judgment upholding defendant Reliance Standard Life Insurance Company's denial of plaintiff Glazer's long-term disability benefits. The court of appeals, in a unanimous decision, upheld the district court's summary judgment as applying the correct standard of review in holding that Reliance had granted Ms. Glazer a "full and fair" review under the provisions of ERISA (Employee Retirement Income Security Act of 1974). The court of appeals also concluded based on a review of the factual records that Reliance had rightly denied Ms. Glazer's long-term disability benefits.

Facts of the Case

Priscilla Glazer worked for The Ultimate Software Group as a senior technical writer. The Ultimate Software Group offered its employees long-term disability insurance under a plan provided by Reliance. According to the plan, an insured is "totally disabled" if he/she "cannot perform the substantial and material duties of his/her regular occupation." Per the plan, Reliance had the discretion "to determine eligibility for benefits."

Ms. Glazer experienced shoulder pain in 1996, leading to a diagnosis of numerous medical conditions, including myofascial pain syndrome, fibromyalgia, cervical spondylosis, chronic cervical strain, and radiculopathy. In June 2003, she stopped working, in accordance with the recommendations of her physician, Dr. Thomas Hoffeld. She also applied for disability benefits. Dr. Hoffeld's findings in the fall of 2003 documented that she had trouble with typing and sitting certain lengths of time. In January 2004, her disability application was approved by Reliance. Dr. Alan Novick started treating her in October 2003. In April, 2004, Dr. Hoffeld assessed her as still unable to return to work. However, in the subsequent month, Dr. Novick noted that her pain had been ameliorated.

Reliance's request to Ms. Glazer's physicians, Dr. Hoffeld and Dr. Novick, for her most current medical records as a part of re-examining her benefits in March 2004 was only responded to by Dr. Novick. In May 2004, Dr. Novick documented that Ms. Glazer, in addition to sedentary work, could now perform physical activities like simple grasping and fine manipulation (required for typing). In July 2004, after taking into consideration Dr. Novick's report, an interview with Ms. Glazer, and her job description, Reliance determined that she was capable of performing her occupation and her long-term disability benefits were terminated.

Ms. Glazer then went to see Dr. Benjamin Lechner, although she had not seen him since their last appointment in February 2003. Dr. Lechner reviewed her records and in his report noted that she could not use a computer and stated that her medical conditions rendered her "disabled for gainful employment." Dr. Novick reported that she was feeling better in July 2004, and her condition was stable