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In the Supreme Court of the State of California

REYNALDO A. MALDONADO, **Petitioner,** **v.** **THE SUPERIOR COURT OF SAN MATEO COUNTY,** **Respondent,** **THE PEOPLE OF THE STATE OF CALIFORNIA,** **Real Party in Interest.**	Case No. S183961

First Appellate District, Division Five, Case No. A126236
San Mateo County Superior Court, Case No. SC065313
The Honorable Mark R. Forcum, Judge

REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Whether the Fifth Amendment requires, as a prophylactic measure, the prosecution's exclusion from an accused's court-ordered psychiatric examination, and the nondisclosure of examination results, pending an in camera redaction hearing attended only by the defense.

2. Whether an anticipatory pretrial writ lies to review protective orders relating to criminal discovery where appeal is available for the review of alleged Fifth or Sixth Amendment violations.

INTRODUCTION

Convinced that California courts insufficiently safeguard defendants from compelled self-incrimination, the Court of Appeal mandated a novel set of prophylactic measures to exclude the prosecution from petitioner's mental evaluation ordered in light of his intended mental defense and from hearings on the redaction of petitioner's examination statements. These prophylactic rules trace to the Court of Appeal's erroneous conception that petitioner's Fifth Amendment right against self-incrimination is violated by mere disclosure to the prosecution of his statements to the evaluators, as opposed to the actual use of the statements at trial. From that false premise, the appellate court further erred by concluding that the use and derivative use immunity doctrine is facially insufficient to guarantee petitioner's constitutional trial rights.

The appellate court's prophylactic measures lack both constitutional justification and support in precedent. Moreover, they conflict with legitimate legislative policy and give rise to unacceptably pernicious consequences in California criminal cases. They should be rejected.

STATEMENT OF THE CASE AND FACTS

Petitioner faces a noncapital trial for special-circumstance first degree murder by means of lying in wait (Pen. Code, §§ 187, subd. (a), 190.2,

subd. (a)(15)). (Petn. Exh. 1 at pp. 1-2.) In early 2008, he gave notice of defense evidence of neurocognitive deficits ostensibly suffered from childhood brain trauma or congenital brain dysfunction. (Petn. at pp. 20-21.) Petitioner disclosed his statements to, and the reports of, his mental experts, including psychologist Jeffrey Kline, Ph.D. (reporting petitioner's mild retardation and neurocognitive deficits), psychologist Robert Perez, Ph.D. (reporting neuro-psychological tests producing similar findings) and neurologist Peter Cassini, M.D. (reporting petitioner's neurocognitive deficits and MRI results reflecting an old brain injury). (Petn. at pp. 20-21; Petn. Exh. 7 at pp. 51-53.)

In August 2008, the respondent court declared a doubt as to petitioner's competency and appointed psychologists to evaluate petitioner. In March 2009, the court found petitioner competent and reinstated the criminal proceeding.[1] In August 2009, the court granted the prosecution's motion pursuant to Evidence Code section 730 and directed an examination of petitioner by a court-appointed psychiatrist, psychologist, and neurologist. (See Petn. at p. 2; Petn. Exh. 2 at p. 1, Petn. Exh. 3 at p. 1.) Petitioner sought an extraordinary writ to vacate the examination order based on *Verdin v. Superior Court* (2008) 43 Cal.4th 1096. The Court of Appeal and this Court summarily denied relief. (*Maldonado v. Superior Court*, A125920, petn. for review denied September 23, 2009 (S176084) [unpub. orders].)

In September 2009, the respondent court heard petitioner's motion for protective measures relating to the examinations. (Petn. Exhs. 2, 4, 7; Petn. at pp. 3-8, 22.) The court denied his request for *Miranda*[2] warnings in the

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[1] The competency evaluations and determination are not part of the current proceedings.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

examinations.[3] It denied his request to preclude the experts from discussing the homicide case.[4] It deferred ruling on his request for a hearing outside the jury's presence regarding Evidence Code section 730 expert evidence proffered by the prosecution. (Petn. Exh. 7 at p. 47; Petn. Exh. 4 at p. 3 [Request No. 22].) It denied his proposed protective measures pertaining to the prosecution's involvement in selecting the court's experts. (Petn. Exh. 4 at p. 3 [Request Nos. 24, 25].)

The court granted the following protections requested by petitioner:

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[3] In that connection, the court stated:

> [T]here is, from my perspective, no authority for the proposition that the [*Miranda*] right or admonition would need be given before a mental examination of experts, by experts, excuse me, appointed by the Court. The results of which are potentially only admissible if the defendant puts his mental state at issue.
>
> And . . . following the case of *Buchanan vs. Kentucky* [(1987) 483 U.S. 402] an interview with a criminal defendant in that context specifically where the defendant is putting his mental state at issue the results of which are only admissible if the defendant puts them at issue at trial under *Buchanan vs. Kentucky* does not constitute a Fifth Amendment violation.

(Petn. Exh. 7 at pp. 34-35; see also Petn. Exh. 2 at p. 4 [Request No. 13].)

[4] In that connection, the court stated:

> It is the Court's view that that case [*Buchanan, supra*, 483 U.S. 402] makes it clear that there is no Fifth Amendment privilege against self-incrimination if the defendant puts his mental state at issue by raising a diminished actuality defense.

(Petn. Exh. 7 at p. 40; see also Petn. Exh. 4 at p. 2 [Request No. 18].)

Appointing "objective evaluators who are not allied to one party or the other." (Petn. Exh. 7 at p. 25.)[5]

Permitting petitioner to object to any proposed court expert. (Petn. Exh. 7 at p. 27.)

Permitting defense counsel and a defense expert to observe the examinations through a real time monitoring system. (Petn. Exh. 7 at p. 29.)

Providing defense counsel with the court experts' reports, notes, and recordings, within 48 hours of their creation. (Petn. Exh. 7 at p. 30.)

Providing defense counsel with reasonable notice of any court expert's visit to petitioner. (Petn. Exh. 7 at p. 32.)

Videotaping the mental health examinations, and recording the physical examinations in some manner. (Petn. Exh. 7 at p. 36.)

Precluding release of earlier competency evaluations to court experts. (Petn. Exh. 7 at p. 39.)

Requiring that any court expert be a neurologist or neuro-psychologist. (Petn. Exh. 7 at p. 42.)

The present case concerns the court's denial of five protective measures requested by petitioner. Those measures would prohibit the prosecution's contact with the court-appointed experts, its access to the examinations, or its knowledge of any examination results, until after the defense rests its case at trial and the court conducts an in camera review of the results. One measure also would prohibit the trial court from ruling on the admission into evidence of the work of those experts until after

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[5] The court ultimately selected psychiatrist Jose Maldonado, M.D., neuro-psychologist Shelly Peery, Ph.D., and neurologist Jaime Lopez, M.D., to conduct the examinations. (Petn. Exh. 7 at pp. 57-63.)

completion of the in camera hearing. (See Petn. at p. 15 [Request Nos. 5, 6, 7, 8, 10].) Those five protective measures are as follows:

> 5) To prohibit any district attorney . . . or any of their respective staff . . . from being present during the conduct of any of the examinations of defendant by any of the Evidence Code section 730 Court-appointed experts;
>
> 6) To prohibit access by any officials referred to under item 5 to any of the reports, notes and/or recordings of the examinations and investigations by any of the experts appointed by the Court pursuant to Evidence Code section 730 until after the close of the defense case at the jury trial of the above-mentioned case, upon which the Court will inspect, *in camera*, any such reports, notes, and/or recordings of the examinations and investigations resulting from the Court's appointment to determine whether the prosecution should have copies of such reports, notes and/or recordings;
>
> 7) To decide the question of admissibility of any of the evidence adduced as a result of the work of the experts appointed by the Court pursuant to Evidence Code section 730 only after the steps in item 6 have been completed and only upon a hearing at which both parties have the right to be heard;
>
> 8) To prohibit any officials referred to under item 5 from any contact with any experts appointed by the Court under Evidence Code section 730 until after the Court's *in camera* decision referred to in item 6 and only if the Court grants the prosecution permission to do so;
>
> [¶] . . . [¶]
>
> 10) To require the experts appointed pursuant to Evidence Code section 730 to maintain confidentiality regarding their examinations and investigations of defendant with the exceptions [of providing information to the defendant as allowed by other protective measures] as well as the exception that said experts will provide the Court with copies of their notes, reports and recordings, immediately following the conclusion of their work.

(See Petn. Exh. 2 at pp. 2-3 [Request Nos. 5, 6, 7, 8, and 10].)

In denying those measures, the trial court said: "I think we all agree that nobody else needs to be in the room, however, in fairness, if I'm allowing the defense expert and yourself to be present during this I don't think it's appropriate to limit the People's ability to have people present as long as they are present through the realtime monitor process." (Petn. Exh. 7 at pp. 47-48.) It added, "If [the prosecution is] going to get the reports anyway, which you're entitled to under reciprocal discovery, then it doesn't make much sense to preclude you from attending the actual interview." (Petn. Exh. 7 at pp. 52-53.) Recognizing that the prosecution already had statements given by petitioner to both the police and his defense experts, as well as the defense experts' reports, the court found no tactical advantage accrued to the prosecution from being present at the examinations. (Petn. Exh. 7 at p. 54.)

Petitioner promptly filed a second petition for writ of mandate and/or prohibition. The Court of Appeal stayed the examinations pending its consideration of the petition and issued an alternative writ requiring the respondent court to grant petitioner's proposed protective measures, numbers 5, 6, 7, 8, and 10, or to show cause why a peremptory writ should not issue. After the trial court reaffirmed its rulings in response to the alternative writ (Ret. Exh. 1 at pp. 33-35), the Court of Appeal stayed trial proceedings. Subsequently, in May 2010, a divided panel of the Court of Appeal granted petitioner's petition in part and issued a writ of mandate.

The court assumed two matters that petitioner did not dispute: the validity of the trial court's order that petitioner submit to psychiatric examinations, and the admissibility of the results of the examinations in rebuttal to his trial evidence of his mental condition. (Maj. Opn. at p. 17.)[6]

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[6] Although the challenged order directed petitioner to submit to examination by the *court*'s experts pursuant to Evidence Code section 730 (continued...)

The central issue the court decided was "when, and under what circumstances, are the examination results to be disclosed to the prosecution." (Maj. Opn. at p. 17.) The court held that the prosecution was entitled to results of the court-ordered psychiatric examination before trial. (Maj. Opn. at p. 20 ["We conclude that pretrial disclosure of the examination results is necessary to permit the prosecution to prepare its rebuttal case so that it can subject Maldonado's psychiatric evidence to the truth-revealing process of adversarial testing, and to avoid significant mid-trial delays in proceedings."].)

However, the court found additional prophylactic measures were constitutionally compelled before the expert evaluations could be released to the prosecution. It appeared to acknowledge that the Fifth Amendment is not violated by mere disclosure of compelled statements, but rather only by *use* of those statements at trial. (Maj. Opn. at pp. 30-31 [discussing *United States v. Verdugo-Urquidez* (1990) 494 U.S. 259, 264, *United States v. Balsys* (1998) 524 U.S. 666, 671, 691-698, and *Chavez v. Martinez* (2003) 538 U.S. 760, 767-773 (plur. opn. of Thomas, J.)]; see also *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 727.) It also recognized that until the defendant actually puts on his defense, his statements to the court-appointed alienists are protected under *Kastigar v. United States* (1972) 406 U.S. 441, 453, which provides use and derivative use immunity for material that exceeds the scope of any future waiver. (Maj. Opn. at pp. 33-34; cf. *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478.)

(...continued)
and *Verdin*, *supra*, 43 Cal.4th at pages 1106-1114, the court recognized that the Legislature has now amended Penal Code section 1054.3 to permit the court to order the defendant to submit to examination by the prosecution's experts. (Maj. Opn. at p. 16.)

The Court of Appeal anticipated that petitioner statements to the evaluators might not be coextensive with the scope of his waiver in introducing his mental defense at trial. (Maj. Opn. at pp. 19-25.) On that basis it held that "a simple bar against derivative use is not alone a failsafe protective measure." (Maj. Opn. at p. 35.) The court concluded that the only way to protect fully petitioner's Fifth Amendment right was to bar the prosecution from the examinations and to interpose an in camera hearing from which the prosecution is also excluded, before any examination results are released to it. The appellate court directed the trial court to evaluate in camera hearing all the examination materials to determine if any of petitioner's statements exceed the scope of his waiver and to redact such statements before disclosing the remainder to the prosecution. (Maj. Opn. at pp. 36-38.)

Its judgment provides:

> The alternative writ is discharged and the petition is granted in part and denied in part consistent with the views expressed in this opinion. A peremptory writ of mandate shall issue directing the trial court to vacate its September 8, 2009 order with respect to request numbers 5, 6, 7, 8 and 10 and enter a new order consistent with the views expressed in this opinion. The order shall provide that:
>
> 1) Prosecuting attorneys and their agents shall be barred from observing the examinations of Maldonado in realtime. All persons present at the examinations, including the examiners, shall be barred from disclosing any statements made by Maldonado during the course of the examination until expressly authorized to do so by the trial court.
>
> 2) Within a specified amount of time after the conclusion of each examination (to be determined by the trial court), Maldonado may assert any privilege objections to disclosure of his statements, or any portion thereof, made during the course of the examinations. The motion may be filed under seal and the trial court must conduct an initial in camera review of the motion to determine whether the motion has merit.

3) In ruling on the motion, the trial court shall determine if Maldonado's statements to the examiners, in whole or in part, remain subject to Fifth Amendment privilege, redact any statements it finds to be privileged, and may then order the balance of the results of the examinations, including any notes and recordings, disclosed to the prosecution. The court must also consider whether disclosure should be conditioned or limited in any fashion in order to preserve any valid assertion of privilege, or to preclude derivative use.

The previously issued stay shall remain in effect until the remittitur issues.

(Modification of Maj. Opn at pp. 1-2, filed May 17, 2010.)

Justice Needham disagreed with the court's analysis and conclusion:

In the matter before us, the prosecutor agreed that evidence obtained from the examinations of Maldonado would be used only to the extent Maldonado pursued his neurocognitive defense at trial. Such use would not run afoul of the Fifth Amendment. (E.g., *Buchanan v. Kentucky*[, *supra*,] 483 U.S. [at pp.] 422-424 (*Buchanan*).) Furthermore, it was never contended that the prosecutor would make derivative use of the evidence, so there was never any danger that the timing and method of disclosing the examination results would violate Maldonado's Fifth Amendment rights either. Indeed, it was clear (at least until this court's decision today) that a guarantee of use immunity and derivative use immunity protects the privilege against self-incrimination, since such immunity by itself "remove[s] the dangers against which the privilege protects." (*Kastigar v. United States* (1972) 406 U.S. 441, 449 (*Kastigar*).) To the extent Maldonado could not convince the trial court to impose additional safeguards in its discretion, he has an adequate remedy at law. His petition for extraordinary relief therefore failed to allege circumstances justifying our review, and his petition should have been denied.

The majority opinion, however, embraces Maldonado's petition as an opportunity to usher in a new era of Fifth Amendment law. Eschewing California and federal precedents, it suggests that use and derivative use immunity is no longer good enough. Overlooking petitioner's acknowledgement that a trial court might, in its discretion, properly employ a variety of

> approaches to adequately protect a defendant's rights, this court strips all trial courts in this state of discretion to tailor Fifth Amendment protections to the circumstances of the case, and forces them instead to don a one-size-fits-all procedure that will likely fit very few. I respectfully but strongly dissent.

(Dis. Opn. at p. 1.)

SUMMARY OF THE ARGUMENT

The Court of Appeal's novel prophylactic measures for pretrial mental examinations of the accused are both sweeping and unnecessary. The appellate court has categorically barred prosecutorial monitoring of such examinations. It has prohibited prosecutorial receipt of the examination reports directly from an evaluator—absent permission of the trial court. It has created a new pretrial in camera hearing procedure. In the newly mandated hearing, with only the defendant and his representatives present, the trial court must now review the evaluators' reports and all other materials arising from the examination. The trial court must strive to determine the possible expert testimony that may be offered at trial. Based on that one-way anticipatory review, it must then redact or exclude any information that possibly may exceed the scope of the defendant's waiver when he subsequently presents his defense at trial.

No convincing rationale for these new procedures can be found in the law. Petitioner's Fifth Amendment rights are not violated by the disclosure of his compelled statements to the prosecution. The availability of use and derivative use immunity as delineated under *Kastigar* is sufficient protection of petitioner's Fifth Amendment rights. Contrary to the Court of Appeal's analysis, it is of no moment that *Kastigar* fails to prevent disclosure because the Fifth Amendment is violated by the use of compelled statements, not mere disclosure of them. As a result, *Kastigar*'s

use and derivative use immunity protections necessarily do satisfy petitioner's Fifth Amendment rights.

The Court of Appeal's new procedures are contrary to the procedure set out by the Legislature in newly enacted Penal Code section 1054.3. The logistical problems that would be caused by the court's prophylactic cures far outweigh the nonexistent constitutional problem it diagnosed.

Because petitioner's Fifth Amendment rights are implicated only by the actual use of compelled statements, his constitutional complaints are most appropriately litigated if and when they arise at trial by the respondent court. There is no imminent threat of improper use of compelled statements by the prosecution. If any constitutional incursions on petitioner's rights appear later, then an appeal based on the trial record demonstrating how his statements were used provides not merely an adequate but a superior remedy. Accordingly, the Court of Appeal should not have granted pretrial writ review of the respondent court's protective orders in this case.

ARGUMENT

I. THE FIFTH AMENDMENT DOES NOT COMPEL THE PROPHYLACTIC MEASURES ADOPTED BY THE COURT OF APPEAL

The Court of Appeal erred in categorically barring the participation of the prosecution from proceedings when the accused's mental state is at issue and the court has ordered an examination by a court-appointed or prosecution-retained mental expert. The court's novel procedures lack constitutional justification and conflict with the better-suited procedures delineated by the Legislature in newly enacted section 1054.3. The prophylactic measures invented by the Court of Appeal are, in essence, designed to cure a nonexistent constitutional problem. Indeed, not only are

the procedures unnecessary to achieve the court's stated objectives, they are likely to create unintended traps for the prosecution and the trial court.

A. Legal Landscape

When a defendant intends to place his mental state at issue in trial, the trial court may order the defendant to submit to an examination by a court-appointed or prosecution-retained expert without violating the Fifth or Sixth Amendments.

The initial statement of the United States Supreme Court in this arena came in *Estelle v. Smith* (1981) 451 U.S. 454. The trial court in *Smith* ordered a psychiatric examination of a death penalty defendant to determine his competency. (*Id.* at pp. 456-457.) The examination took place without defense counsel and without *Miranda* warnings. During the penalty phase, the psychiatrist testified regarding defendant's future dangerousness. (*Id.* at pp. 459-460.) In *Smith*, the Supreme Court held that the testimony violated the defendant's Fifth Amendment rights because the psychiatrist "went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." (*Id.* at p. 467.)

The Court also found the testimony violated the defendant's Sixth Amendment right to counsel because defense counsel was not notified that the results could be used to prove the defendant's future dangerousness for purposes of imposing a sentence of death. (*Id.* at p. 471.) Although the Court found impermissible the use of a compelled competency examination to prove future dangerousness at sentencing where the defendant had not tendered his mental state at trial, it was careful to note that "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase." (*Smith, supra*, 451 U.S. at p. 472.)

The Court subsequently underscored the limited scope of *Smith* in *Buchanan v. Kentucky*, *supra*, 483 U.S. 402. In *Buchanan*, the Court emphasized "the trial judge [in *Smith*] had ordered, sua sponte, the psychiatric examination and Smith neither had asserted an insanity defense nor had offered psychiatric evidence at trial. We thus acknowledged that, in other situations, the State might have an interest in introducing psychiatric evidence to rebut petitioner's defense." (*Buchanan*, *supra*, 483 U.S. at p. 422; see also *Penry v. Johnson* (2001) 532 U.S. 782, 794-795.)

Buchanan presented just such a different situation. There, following a joint request of the parties, the trial court ordered a psychiatric examination of the defendant. (*Buchanan*, *supra*, 483 U.S. at pp. 410-411.) *Buchanan* found that the defendant's Fifth and Sixth Amendment were not violated by the prosecution's use of the court-appointed expert's report to rebut defendant's emotional disturbance defense. (*Id.* at p. 423.)

> [I]f a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

(*Id.* at pp. 422-423.)

Accordingly, the Court concluded:

> [P]etitioner's entire defense strategy was to establish the "mental status" defense of extreme emotional disturbance. Indeed, the sole witness for petitioner was Elam, who was asked by defense counsel to do little more than read to the jury the psychological reports and letter in the custody of Kentucky's Department of Human Services. In such circumstances, with petitioner not taking the stand, the Commonwealth could not respond to this defense unless it presented other psychological evidence. Accordingly, the Commonwealth asked Elam to read excerpts of Doctor Lange's report, in which the psychiatrist had set forth his general observations about the mental state of petitioner but had not described any statements by petitioner dealing with the

> crimes for which he was charged. The introduction of such a report for this limited rebuttal purpose does not constitute a Fifth Amendment violation.

(*Id.* at pp. 423-424.)

1. Fifth Amendment

Post-*Buchanan* authorities have repeatedly affirmed that no Fifth Amendment violation arises where the prosecution uses psychiatric evidence to rebut psychiatric evidence introduced by the defendant. (See Fed. Rules of Crim. Proc., rule 12.2, Advisory Committee Notes, 2002 Amendments ["subsequent cases have indicated that the defendant waives the privilege if the defendant introduces expert testimony on his or her mental condition," collecting cases]; *Powell v. Texas* (1989) 492 U.S. 680, 684 [finding support in *Smith* and *Buchanan* for conclusion that "the defendant's use of psychiatric testimony might constitute a waiver of the Fifth Amendment privilege, just as the privilege would be waived if the defendant himself took the stand"]; *Penry v. Johnson*, *supra*, 532 U.S. at p. 794 [distinguishing *Smith* on several grounds including that the defendant introduced psychiatric evidence].) This is so even when the psychiatric evidence is from a court-ordered examination of the defendant. (See, e.g., *United States v. Kessi* (9th Cir. 1989) 868 F.2d 1097, 1107-1108 [finding no error where the prosecution introduced evidence regarding court-ordered psychiatric examination when the defendant introduced evidence regarding post-traumatic stress disorder].)

That Fifth Amendment protections do not apply in that situation is clear, though the rationale has not always been so. In their former capacities as federal circuit court judges, Justice Scalia was joined by Justice Ginsburg in one en banc plurality opinion, where he observed that courts offer various explanations for finding that a defendant who intends to raise an insanity defense at trial or a mental defense in capital sentencing

lacks a Fifth Amendment privilege to refuse to submit to a mental examination by a court-appointed or prosecution-retained expert for purposes of rebutting that defense. (*United States v. Byers* (D.C. Cir. 1983) 740 F.2d 1104, 1111-1116.) Those rationales include waiver, estoppel, and fundamental fairness to the state. (*Id.* at pp. 1112.) While the variety of offered rationales were not ideal explanations, Justice Scalia wrote that they were important "devices—no more fictional than many others to be found—for weaving a result demanded on policy grounds unobtrusively into the fabric of the law." (*Id.* at p. 1113.)

> Whether they have described this policy as the need to maintain a "fair state-individual balance" [citations], or as a matter of "fundamental fairness," [citation], or merely a function of "judicial common sense," [citation], they have denied the Fifth Amendment claim primarily because of the unreasonable and debilitating effect it would have upon society's conduct of a fair inquiry into the defendant's culpability. As expressed in *Pope*[7]:
>
> > It would be a strange situation, indeed, if, first, the government is to be compelled to afford the defense ample psychiatric service and evidence at government expense and, second, if the government is to have the burden of proof, . . . and yet it is to be denied the opportunity to have its own corresponding and verifying examination, a step which perhaps is the most trustworthy means of attempting to meet that burden.
>
> [Citation.] We agree with this concern, and are content to rely upon it alone as the basis for our rejection of the Fifth Amendment claim. We share the dissent's solicitude for the "private enclave of the human personality," Dissent at 1151. But when, as here, a defendant appeals to the nature of that enclave as the reason why he should not be punished for murder, and introduces psychiatric testimony for that purpose, the state must be able to follow where he has led.

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[7] *Pope v. United States* (8th Cir. 1967) 372 F.2d 710 (en banc), vacated and remanded on other grounds, 392 U.S. 651.

(*Byers*, *supra*, 740 F.2d at p. 1113.)

The Supreme Court endorsed both *Byers* and *Pope* in *Buchanan* in finding the defendant waived his Fifth Amendment right by presenting an insanity defense at trial. (*Buchanan*, *supra*, 483 U.S. at pp. 422-423; see also *Powell v. Texas*, *supra*, 492 U.S. at p. 684 [explaining that *Buchanan* held a defendant who seeks to introduce psychiatric evidence for a mental status defense waives Fifth Amendment privilege with respect to such evidence]; see generally *Commonwealth v. Morley* (Pa. 1996) 681 A.2d 1254, 1257, fn.4 [observing that after *Buchanan* "the inferior federal courts have universally recognized that when a defendant puts her mental status at issue, her rights against self-incrimination are not violated by either an interview with or testimony from a prosecution psychiatrist. [Citations]"].)

Buchanan and *Byers* confronted claims of insanity or future dangerousness in the capital sentencing context, rather than mens rea defenses directed at negating specific intent. Nevertheless, most jurisdictions have found the Fifth Amendment waiver extends to all mental defenses. As the Pennsylvania Supreme Court observed,

> Several courts have been presented with the argument that while it may be appropriate to compel an examination by a State psychiatrist of a defendant who raises an insanity defense, it is inappropriate where the defendant has raised a mental infirmity defense other than insanity. The courts have overwhelmingly rejected this distinction as being irrelevant in determining whether a defendant retains the privilege against self-incrimination during the psychiatric interview. *See, e.g.*, *Arizona v. Schackart*, 175 Ariz. 494, 858 P.2d 639 (1993); *Hartless v. State*, 327 Md. 558, 611 A.2d 581 (1992); *State v. Goodwin*, 249 Mont. 1, 813 P.2d 953 (1991); *State v. Briand*, 130 N.H. 650, 547 A.2d 235 (1988); *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983). *Contra State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984).
>
> We are in agreement with the majority of these courts on this issue. The rationale supporting our holding in the matter *sub judice* is that where a defendant has raised a mental

> disability defense, a defendant has waived his or her privilege against self-incrimination and may be compelled to submit to a psychiatric exam so that the Commonwealth can prepare its case in rebuttal.

(*Commonwealth v. Morley*, *supra*, 681 A.2d at p. 1258, fn. 5; accord, *In re Spencer* (1965) 63 Cal.2d 400, 412, fn.10 [finding waiver of Fifth Amendment privilege if defendant places his mental state at issue by "the proffer at the guilt trial of such defenses as 'diminished capacity' or epilepsy"].)

2. Sixth Amendment

The overwhelming majority of jurisdictions also conclude that a defendant has no Sixth Amendment right to counsel during an examination by a court-appointed or prosecution-retained expert, or to receive a *Miranda* admonition prior to the examination. (See, e.g., *State v. Martin* (Tenn. 1997) 950 S.W.2d 20, 25-27 [collecting cases rejecting defendants' Sixth Amendment challenges]; cf. *People v. Chung* (2005) 793 N.Y.S.2d 323, 326 [noting that, although New York law provides additional protections under state law, "[t]he general consensus to be found among the various jurisdictions is that there is no federal or state constitutional right to counsel at a psychiatric examination, nor does the Sixth Amendment guarantee to assistance of counsel require a court to compel a psychiatric examination to be recorded"].)

As explained in *Byers*, the Sixth Amendment requires only that the defendant have the advice of counsel at the time he gives notice that he will raise a mental defense, not at the examination itself. (*Byers*, *supra*, 740 F.2d at pp. 1116-1120; see also *Powell v. Texas*, *supra*, 492 U.S. at pp. 684-686 [focus of the Sixth Amendment inquiry is whether defense counsel had

advance notice that defendant would be subject to a court-ordered examination].)[8]

3. California's approach

California falls squarely in the majority camp in its approach to the Fifth and Sixth Amendments in this context. California's approach to compelled mental evaluations is set out in *In re Spencer*, *supra*, 63 Cal.2d at pages 412 to 413.

> Before submitting to an examination by court-appointed psychiatrists a defendant must be represented by counsel or intelligently and knowingly have waived that right. Defendant's counsel must be informed as to the appointment of such psychiatrists. [Citation.] If, after submitting to an examination, a defendant does not specifically place his mental condition into issue at the guilt trial, then the court-appointed psychiatrist should not be permitted to testify at the guilt trial. If defendant does specifically place his mental condition into issue at the guilt trial, then the court-appointed psychiatrist should be permitted to testify at the guilt trial, but the court should instruct the jurors that the psychiatrist's testimony as to defendant's incriminating statements should not be regarded as proof of the truth of the facts disclosed by such statements and that such evidence may be considered only for the limited purpose of showing the information upon which the psychiatrist based his opinion.
>
> In view of these rules, once a defendant, under the advice of counsel, submits to an examination by court-appointed psychiatrists, he is not constitutionally entitled to the presence of

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[8] *Byers* also rejected the suggestion that a defendant undergoing an mental examination by a prosecution-retained psychiatrist is being "'confronted . . . by his expert adversary' or 'by his professional adversary,'" thereby requiring the presence of counsel. *Byers* observed that "[a]n examining psychiatrist is not an adversary, much less a professional one. Nor is he expert in the relevant [Sixth Amendment] sense—that is, expert in 'the intricacies of substantive and procedural criminal law.'" (*Byers*, *supra*, 740 F.2d at p. 1119.)

> his counsel at the examination. If the defendant does not specifically place his mental condition into issue at the guilt trial, the exclusion of counsel at the examination cannot affect the guilt trial since the psychiatrist may not testify at that trial. If defendant does specifically place his mental condition into issue at the guilt trial, he can offer no valid complaint as to the testimony of the psychiatrist at that trial. After voluntarily submitting to the examination, defendant cannot properly preclude expert testimony on a subject that he has himself injected into the trial. Moreover, the limiting instruction furnishes further protection. Thus, whether or not defendant places his mental condition into issue at the guilt trial, the above safeguards are sufficient to justify the exclusion of counsel from the psychiatric examination and at the same time avoid a deprivation of defendant's constitutional rights.

(*Ibid.*; accord, *People v. Williams* (1988) 44 Cal.3d 883, 934, 961-962; *People v. Centeno* (2004) 117 Cal.App.4th 30, 40; *People v. Danis* (1983) 31 Cal.App.3d 782, 786-787, superseded by statute as explained in *Verdin v. Superior Court*, *supra*, 43 Cal.4th at p. 1106.)

In this case, the Court of Appeal did not question California's general approach to compelled examinations, or the constitutionality of the trial court's order compelling petitioner to submit to a mental examination. (Maj. Opn. at p. 17.) Rather, the Court of Appeal questioned the adequacy of California's safeguarding of petitioner's Fifth Amendment rights before he presents his mental defense. (Maj. Opn. at p. 19.) To allay its concerns, the appellate court crafted prophylactic measures that it deemed constitutionally compelled. Thus, it barred the prosecution from observing the examination or obtaining the results until the trial court conducts a pretrial in camera hearing, from which the prosecution must be excluded, to review the examination results with the defense and redact any material that potentially exceeds the scope of petitioner's Fifth Amendment waiver when he subsequently presents his defense at trial. (Maj. Opn. at pp 27-38.)

The appellate court provided two interrelated justifications for these measures. First, it concluded that petitioner's Fifth Amendment right requires protection from the disclosure of compelled statements to the prosecution. Second, it concluded that use and derivative use immunity, as delineated in *Kastigar v. United States*, *supra*, 406 U.S. 441, is insufficient to protect petitioner's Fifth Amendment rights because *Kastigar* does not prevent disclosure. Neither justification withstands inspection.

B. The Fifth Amendment's Self-Incrimination Clause Prohibits Use of Compelled Statements, Not Access to Them

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."

"The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants." (*United States v. Verdugo-Urquidez* (1990) 494 U.S. 259, 264.) "Although conduct by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial.*" (*Ibid.*, italics added; see also *Chavez v. Martinez* (2003) 538 U.S. 760, 767 (plur. opn. of Thomas, J.) ["Statements compelled by police interrogations may not be used against a defendant at trial . . . but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs"]; *Kastigar v. United States*, *supra*, 406 U.S. at p. 453 [holding that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege"].) "The text of the Self-Incrimination Clause simply cannot support the . . . view that the mere use of compulsive questioning, without more, violates the Constitution." (*Chavez v. Martinez*, *supra*, 538 U.S. at p. 767 (plur. opn. of Thomas, J.); see also Pardo, *Disentangling the Fourth Amendment and the Self-Incrimination Clause* (2005) 90 Iowa

L.Rev. 1857, 1872 ["The Fifth Amendment prohibits only the use or derivative use of compelled, incriminating testimonial communications during a criminal prosecution. Therefore, there is no remedy if statements are compelled out of court but the suspect is not prosecuted"].)

California case law recognizes the distinction between access to compelled statements as opposed to the use of those statements. This Court recently explained in *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 727:

> The state and federal self-incrimination clauses say one cannot be made an involuntary witness against himself, or herself, *in a criminal proceeding*. Thus, they do not prohibit officially compelled admissions of wrongdoing as such. They only forbid the criminal use of such statements against the declarant. Constitutionally based prophylactic rules, such as a prior-immunity requirement in some cases, have arisen to protect the core privilege, but the right against self-incrimination is not itself violated until statements obtained by compulsion are used in criminal proceedings against the person from whom the statements were obtained.

In light of the access/use distinction, rule 12 of the Federal Rules of Criminal Procedure affords federal prosecutors access to compelled psychiatric examination results, but prevents the prosecution from using the results until after the defendant presents mental health issues at trial. Rule 12.2(b)(1) provides, "[i]f a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on . . . the issue of guilt . . . the defendant must . . . notify an attorney for the government in writing of this intention." Under rule 12.2(c)(1)(B), "[i]f the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court." Under rule 12.2(c)(4)(A), fruits of the compelled examination may be used "on an issue regarding mental condition on which the defendant . . . has introduced

evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1)."[9]

The federal courts recognize that the prosecution may obtain the results prior to trial, even if it cannot introduce the results until after the defense ultimately proffers psychiatric evidence at trial. In *United States v. Stockwell* (2d Cir. 1984) 743 F.2d 123, the defendant raised an insanity defense to robbery charges. Prior to trial, a government psychiatric expert examined the defendant, and the prosecutor heard a tape recording of that examination. (*Id.* at pp. 124-125.) The Second Circuit rejected the defendant's claim that "the method by which the prosecutor informed herself of the results of the psychiatric examination violated Rule 12.2(c) and his Fifth Amendment right against self-incrimination." (*Id.* at p. 126.) The court explained:

> [W]hile we do not wish to encourage the practice of requiring defendants to submit to a psychiatric examination in the prosecutor's presence (either in person or through the use of a tape recording), such a procedure cannot be said to constitute a *per se* violation of Rule 12.2(c) and the defendant's Fifth Amendment rights. *The question whether Rule 12.2(c) and the defendant's right against self-incrimination have been violated in a particular case hinges on the use to which the material obtained in the examination is put, and not primarily on the method by which the prosecutor learns of the results of the examination from the psychiatrist.* As Stockwell concedes, the prosecutor has to obtain information about the results of the psychiatric examination in some manner. *As long as the prosecutor restricts his or her use of the defendant's statements to the issue of insanity, there is no violation of the Rule or of the defendant's constitutional rights.*

(*United States v. Stockwell, supra*, 743 F.2d at p. 127, italics added.)

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[9] Various courts have affirmed the constitutionality of requiring a defendant to provide notice of an intent submit a mental defense. (See generally 1 LaFave, Substantive Criminal Law (2d Ed. 2003) §8.2(b), p. 588.)

In *United States v. Hall* (5th Cir. 1998) 152 F.3d 381,[10] the trial court required the capital defendant to submit to a psychiatric examination in response to his indication that he would present psychiatric evidence in mitigation of punishment. The defendant argued that, "in order to adequately safeguard his Fifth Amendment privilege against self-incrimination, the district court could not order a government psychiatric examination unless it sealed the results of the examination until the penalty phase of trial." (*Id.* at pp. 398-399.) The Fifth Circuit rejected this argument, explaining that, despite any policy determinations a trial court might make in favor of such a rule, "we nonetheless conclude that such a rule is not constitutionally mandated." (*Id.* at p. 399.) "We therefore reject Hall's contention that the district court violated his Fifth Amendment privilege against self-incrimination . . . by declining to order the results of the examination sealed until the sentencing hearing." (*Id.* at p. 400.)

The Eighth Circuit later agreed with *Hall*: "Additional prophylactic safeguards beyond this evidentiary framework, such as the sealing of exam results until after the completion of the guilt phase . . . may avoid later litigation but are not constitutionally required. [Citation.] We therefore decline to adopt any such rigid prophylactic rule in the name of the Constitution and leave the matter to the discretion of district courts, subject only to our review for abuse of discretion, which we do not find present in this case." (*United States v. Allen* (8th Cir. 2001) 247 F.3d 741, 774, cert. granted and case remanded on other grounds, 536 U.S. 953.)

Decisions by state courts are even more definitive in their conclusions that such prophylactic measures are not compelled. (See *State v. Martin*,

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[10] Superseded by statute as recognized in *United States v. Taylor* (E.D. Tenn. 2008) 2008 WL 471686 at *10, and overruled on other grounds in *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 310-311.

supra, 950 S.W.2d at p. 25 ["We also reject the defendant's assertion that the prosecution should not have access to any information from the examination until needed at trial 'for impeachment or rebuttal.'"]; *Phillips v. Araneta* (Ariz. 2004) 93 P.3d 480, 484 ["[W]e decline to require that any report generated by an examination of the defendant by a government expert be filed under seal or that the result of any examination be released to the government only in the event that the jury reaches a guilty verdict and the defendant confirms his intent to offer mental health evidence in mitigation."]; *Byrom v. State* (Miss. 2003) 863 So.2d 836, 850 ["We find no error in the decision of the trial judge in the case at bar to require disclosure of the reports prior to the sentencing phase."]; *Cain v. Abramson* (Ky. 2007) 220 S.W.3d 276, 279 ["Furthermore, the protections provided by RCr 7.24(3)(B)(ii) are sufficient to alleviate Cain's concerns that any information he divulges during the evaluation 'cannot be recalled.'"]; cf. *State v. Briand* (N.H. 1988) 547 A.2d 235, 240-241 [not imposing restriction on discovery and suggesting limiting instructions sufficient to protect defendant]; *Sears v. State* (Ga. 1993) 426 S.E.2d 553, 557 ["There was no error in the denial of the defendant's request for a psychiatric evaluation after the guilt phase is completed but before the sentencing phase begins (rather than a pre-trial evaluation)"]; *State v. Manning* (Ohio Ct.App. 1991) 598 N.E.2d 25, 28; see also Fla. Rules Crim.Proc., rule 3.216(f) [authorizing the prosecutor to be present during court-ordered mental examination]; Minn. Rules Crim.Proc., rule 20.2(4) [requiring examination reports be turned over to both parties upon receipt by court]; N.Y. Crim.Proc. Law § 250.10(1)(c)(3) [providing prosecutor may be present during evaluation]; Ohio Rev. Code § 2945.371(G) [requiring examination reports be turned over to both parties upon receipt by court]; Wash. Rev. Code §§ 10.77.060-10.77.065 [same]; cf. Ga. U. Super. Ct. Rule 31.5 ["Contemporaneous with filing the Notice of Intent of Defense to

Raise Issue of Insanity, defendant's attorney shall provide a copy of the Report to the prosecuting attorney . . . ."]; but see Mass. Rules Crim.Proc., rule 14(b)(2)(B) [imposing limitations on disclosure].)

In analogous contexts, California courts have found constitutionally permissible the discovery of psychiatric expert evidence. On a plea of not guilty by reason of insanity, a court may order the defendant to submit to a psychiatric examination by a prosecution expert without infringing his constitutional rights, provided that limitations on use of the examination are in place. (See Pen. Code, § 1027; *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1295 ["a defendant waives the privilege against self-incrimination and the right to counsel regarding expert testimony in sanity trials *to the extent necessary* to permit useful sanity examinations by defense and prosecution mental health experts."].) A defendant may be compelled to submit to a psychiatric examination by a prosecution expert when the defendant raises a question regarding his competency to stand trial, with the limitation that the prosecution may not use the results of the competency evaluation during the trial, nor any fruits derived from that evaluation. (See Pen. Code, §§ 1368, 1369; *Baqleh v. Superior Court*, *supra*, 100 Cal.App.4th at pp. 498-499 ["an accused who places his or her competency at issue and offers psychiatric evidence in support of the lack of competency cannot on the basis of the Fifth Amendment refuse to submit to a court-ordered examination by a prosecution expert and prevent the jury that will determine whether he or she is competent from learning of the refusal"]; cf. *People v. Pokovich* (2006) 39 Cal.4th 1240, 1252-1253 [recognizing use limitation, not discovery limitation, on evidence from competency examinations, but finding no basis for claim that competency evaluations require compelled statements].) A defendant also may be required to produce certain psychiatric expert evidence as part of his discovery obligations under Penal Code section 1054.3. (See *Woods v.*

Superior Court (1994) 25 Cal.App.4th 178, 183, 187 [finding no Fifth Amendment violation where the defendant was required to disclose results of standardized tests by defense expert psychologist].) Similarly, a capital defendant may be compelled to turn over psychiatric evidence that he intends to rely on during the penalty phase. (See *People v. Jones* (2003) 29 Cal.4th 1229, 1264 [holding no Fifth Amendment violation occurred where the trial court required the defendant to disclose his statements to a psychiatric expert listed as a potential penalty phase witness, even though disclosure was ordered prior to the penalty phase].)

In issuing its alternative writ in the present case, the Court of Appeal cited *Estelle v. Smith*, *supra*, 451 U.S. 454, *In re Spencer*, *supra*, 63 Cal.2d 400, and *People v. Williams* (1988) 197 Cal.App.3d 1320. Those decisions explain that the prosecution may not introduce evidence from a compelled psychiatric examination before the defense introduces its psychiatric defense. Rather than support the Court of Appeal's view, the decisions reflect the constitutional distinction that limits the prosecution's use of, not its access to, the defendant's statements.

In mandating the new in camera hearing procedure, the Court of Appeal drew attention to the fact that the Supreme Court has created prophylactic rules guarding the Fifth Amendment, most notably in *Miranda v. Arizona*, *supra*, 384 U.S. 436. *Miranda*, if anything, undercuts the holding below. *Miranda* provides that a custodial suspect must be admonished that he can remain silent before he elects to speak. A court-ordered mental examination is not a custodial interrogation in which the accused elects whether to surrender his right to silence, so the prophylactic to safeguard that right—the admonition—is patently beside the point. Besides, a *Miranda* violation normally results in the exclusion of the statement from evidence, not its nondisclosure to the prosecution. (See generally *Oregon v. Elstad* (1985) 470 U.S. 298, 306.) Indeed, the

prosecution may use an un-*Mirandized* statement for impeachment. (*Harris v. New York* (1971) 401 U.S. 222, 224.) Even when a confession is deemed involuntary, the remedy is to bar the use of that statement at trial for any purpose and to exclude the tainted fruits of the involuntary statement. (See generally *New Jersey v. Portash* (1979) 440 U.S. 450, 458-459.)

The inappropriateness of the Court of Appeal's prophylactic rule is patent when considered in the *Miranda* context. Unlike the Court of Appeal, the Supreme Court considers the bar against use of statements at trial to be the prophylactic protection due the accused under the Fifth Amendment.

C. Use Immunity and Derivative Use Immunity Fully Protect the Defendant's Fifth Amendment Right Against the Use of Statements That Exceed the Scope of His Waiver

The court below erred in finding that "a simple bar against derivative use is not alone a failsafe protective measure." (Maj. Opn. at p. 35.) The United States Supreme Court held in *Kastigar* that use and derivative use immunity is coextensive with and fully satisfies the Fifth Amendment. (*Kastigar v. United States*, *supra*, 406 U.S. at p. 453 ["We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege."].) To the extent that petitioner's statements to the court-appointed experts may prove to exceed the scope of his waiver in proffering his mental defense, no one disputes that those statements will remain protected by judicially imposed use and derivative use immunity. (See *People v. Williams*, *supra*, 197 Cal.App.3d at p. 1324; *In re Spencer*, *supra*, 63 Cal.2d 400, 412; see also *People v. Weaver* (2001) 26 Cal.4th 876, 959-961; *Baqleh v. Superior Court*, *supra*, 100 Cal.App.4th at pp. 498-499; see generally *People v. Pokovich*, *supra*, 39 Cal.4th at pp.

1252-1253 [discussing immunity].) Such immunity is sufficient to safeguard petitioner's Fifth Amendment rights.

The animating force underlying the appellate court's conflicting analysis is its concern regarding "the possibility that some of Maldonado's statements in the context of a compelled examination may still be subject to a claim of privilege." (Maj. Opn. at p. 30.) That possibility is entirely due to the fact that the scope of Maldonado's waiver is dependent upon the nature of the actual defense he presents. (See Maj. Opn. at pp. 25-30.) The appellate court cited several cases to bolster its view that this possibility requires additional protections. Those decisions fail to provide a constitutional basis for the prophylactic measures imposed by the court.

First, the Court of Appeal relied on *Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260. The defendant there intended to present testimony of a psychologist to challenge the voluntariness of his statements to the police. (*Id.* at p. 1263.) The defense had initially retained the psychologist to evaluate the defendant for possible mental defenses. (*Ibid.*) In giving notice that the psychologist would be a witness, the defense turned over a copy of the psychologist's report redacted to omit the expert's summary of the defendant's statements about the crime. (*Ibid.*) The trial court granted the prosecution's request for an unredacted report. (*Id.* at pp. 1263-1264.) *Rodriguez* reversed. Based on the fact that the defendant's statements to the defense-retained psychologist were subject to the attorney-client privilege, *Rodriguez* held that the defendant had not waived the privilege by identifying an expert as a possible witness and providing the expert's report in discovery. (*Id.* at pp. 1266-1270.) The court noted that nothing in the report indicated the expert had relied upon the defendant's statements in reaching his conclusions. The statements were therefore privileged unless and until the defendant presented expert testimony that relied upon those statements, so the court issued a writ

barring the pretrial disclosure. (*Id.* at pp. 1264, 1269; see also *Andrade v. Superior Court* (1996) 46 Cal.App.4th 1609, 1611-1614 [following *Rodriguez*].)

The Court of Appeal's reliance on *Rodriguez* is misplaced. *Rodriguez* addressed only the statutory attorney-client privilege; it expressly refrained from considering any constitutional issues. (*Rodriguez v. Superior Court*, *supra*, 14 Cal.App.4th at p. 1269, fn.5; see generally Evid. Code, §§ 952, 954.) The attorney-client privilege does not apply to statements made by a defendant during a court-ordered mental evaluation, so *Rodriguez* lacks application here.

More fundamentally, the Court of Appeal's reliance on *Rodriguez* is emblematic of its conflation of the Fifth Amendment privilege with statutory privileges. Statutory privileges were created to protect important *relationships* that require intimacy and confidentiality to flourish, and thus privileges function by shielding the information shared as part of those relationships. (See, e.g., *Story v. Superior Court*, *supra*, 109 Cal.App.4th at p. 1013 [noting psychotherapist patient privilege was created with "the view 'that an environment of confidentiality of treatment is vitally important to the successful operation of psychotherapy.'"].)[11] The information shared in such a relationship is statutorily protected from discovery because the act of releasing such information, by itself, undermines the relationship between the parties that the privilege was

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[11] Statutory privileges frequently apply only if the communication was intended to be made "in confidence." (See, e.g., *People v. Mickey* (1991) 54 Cal.3d 612, 654 ["To make a communication 'in confidence,' one must intend nondisclosure [citations], and have a reasonable expectation of privacy [citation]."]; see generally Comment of Assembly Committee on Judiciary for Evid. Code § 917 ["A number of sections provide privileges for communications made "in confidence" in the course of certain relationships."].)

created to foster and protect. For these statutory privileges, the harm arises directly from the act of disclosure.

By contrast, for the Fifth Amendment, the harm arises not from disclosure, but from use.[12] Consequently, cases such as *Rodriguez* that discuss measures designed to protect statutory privileges from *disclosure* are inapposite when addressing issues of the Fifth Amendment protection against *use*. Simply put, the protections set out in *Spencer* and *Kastigar* fully protect an accused from the improper use of any statements or psychiatric evidence in cases like this one.

Rodriguez is also inapposite because that decision was predicated on a conclusion that the defendant had *not* waived his statutory privilege by providing notice of a mental defense challenging the voluntariness of his statements to the police and by turning over the psychologist's report as required by the discovery rules. (*Rodriguez v. Superior Court*, *supra*, 14 Cal.App.4th at pp. 1266-1270.) By contrast, as detailed above, a defendant who provides notice of a mental state defense waives Fifth Amendment protections with regard to his mental state, subject to use and derivative use limitations if the defendant ultimately withdraws that defense at trial. (See *Buchanan v. Kentucky*, *supra*, 483 U.S. at pp. 422-424; *Byers*, *supra*, 740 F.2d at pp. 1111-1116; *In re Spencer*, *supra*, 63 Cal.2d 412-413; *People v. Williams*, *supra*, 44 Cal.3d at pp. 934, 961-962; *People v. Centeno*, *supra*, 117 Cal.App.4th at p. 40; *People v. Danis*, *supra*, 31 Cal.App.3d at pp.

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[12] Indeed, while statutory privileges are essentially inviolate unless waived (or trumped by countervailing constitutional concerns), the Fifth Amendment protection may be overcome by a grant of use and derivative use immunity pursuant to *Kastigar*.

786-787.)[13] Accordingly, *Rodriguez* does not support the appellate court's new procedures.

The appellate court's reliance on cases from Oregon and Oklahoma (Maj. Opn. at pp. 28-30) is also misplaced because each of those states follows a minority approach to the issue of a Fifth Amendment and Sixth Amendment waiver in compelled examinations that California courts reject.

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[13] Although *Rodriguez* is clearly distinguishable, we submit that, in light of the waiver analysis discussed in the Fifth Amendment context, *Rodriguez* is also wrongly decided in two respects. First, *Rodriguez* held that the defendant did not waive his statutory privilege by providing notice he intended to call a psychologist as a mental state expert and turning over the expert's report in compliance with discovery rules. It concluded that, because the disclosure was compelled by the discovery rules, it was involuntary. (*Rodriguez v. Superior Court*, *supra*, 14 Cal.App.4th at pp. 1266-1270.) However, the disclosure was only "compelled" because the defendant decided to use the expert as a witness. For the same reasons discussed in the Fifth Amendment context above, the proper focus for compulsion and waiver is on the defendant's *decision* to use the expert to support a mental defense, which triggers the discovery obligations. Just as that decision constitutes a Fifth Amendment waiver, it also constitutes a waiver of the attorney-client privilege with regard to the expert's evaluation that the defendant intends to use as defense evidence. Second, *Rodriguez* suggested that, absent an affirmative indication in the report that the expert relied on the defendant's statements in reaching its conclusion, the statements must be deemed privileged as if the expert had not relied upon them. (*Id.* at p. 1270.) This suggestion is counterintuitive and highly suspect. An expert is unlikely to ask the defendant about the underlying offense unless the defendant's statements would be relevant to his or her analysis. At the very least, the defense should be required to make a showing that the expert did not rely on the defendant's statements before those statements can be redacted from the report. Not only is there no logical basis for *Rodriguez*'s presumption of non-reliance, that presumption puts the prosecution in the impossible position of having to rebut a presumption when it lacks access to any of the information that would allow it to do so. (Accord, *Andrade v. Superior Court*, *supra*, 46 Cal.App.4th at pp. 1615-1617 (dis. opn. of Woods, J.); *State v. Pawlyk* (Wash. 1990) 800 P.2d 338, 341-345.)

In Oklahoma, a defendant's notice that he will present an insanity defense is a Fifth Amendment waiver allowing a compelled examination, but the waiver is construed very narrowly. In *Traywicks v. State* (Okla. Crim.App. 1996) 927 P.2d 1062, 1065, the court, with little constitutional analysis, held that the scope of the Fifth Amendment waiver was strictly limited to the mental expert's questioning about the defendant's mental state. The court ruled that the defendant could still assert his Fifth Amendment privilege with respect to questioning about the crime itself, regardless of whether those questions would assist the expert in evaluating the defendant's claim of insanity when committing the offense. (*Ibid.*; see also *Lewis v. State* (Okla. Crim.App. 1998) 970 P.2d 1158, 1171 ["[W]hen a defendant raises an insanity defense he waives his Fifth Amendment right to silence regarding mental health issues but he does not waive his right to remain silent regarding the details of the crime."]

Oregon goes even further, holding that a defendant's insanity plea or notice of mental defenses does *not* waive his right to silence or to counsel. Consequently, although an Oregon defendant can be ordered to submit to a mental examination by a prosecution expert, he cannot be compelled to answer any of the expert's questions, nor can the state comment on his refusal to answer, and he has the right to have counsel present during the examination. (See *State v. Petersen* (Or. 2009) 218 P.3d 892.)[14]

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[14] Oregon case law originally distinguished between questioning a defendant about his actions at the time of the offense and questioning him about his mental condition, viewing the former as testimonial under the Fifth Amendment and therefore precluded, while suggesting the latter was nontestimonial—equivalent to a physical exam—which would be permissible. (See *State v. Phillips* (Or. 1967) 422 P.2d 670, 674-675; *Shepard v. Bowe* (Or. 1968) 442 P.2d 238, 239; *State ex rel. Johnson v. Woodrich* (Or. 1977) 566 P.2d 859, 863 (conc. opn. Linde, J.) [observing that under this view of testimonial statements, "[t]aking stock of

(continued...)

California has long rejected both the Oregon and Oklahoma approaches to waiver. California recognized in *Spencer* that the scope of the defendant's waiver extends to all information needed by the expert to evaluate the defendant's claimed mental defense, including information about the crime itself when relevant to the expert's evaluation of the defendant. (*In re Spencer*, *supra*, 63 Cal.2d at pp. 408-410, 412; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 412 ["By tendering his mental condition as an issue in the penalty phase, defendant waived his Fifth and Sixth Amendment rights to the extent necessary to permit a proper examination of that condition."].) The only limitation is that the defendant's statements may not be admitted for their truth as substantive evidence to prove the crime itself, but rather only to demonstrate the basis for the expert's opinion. (*Id.* at p. 412; *People v. Williams*, *supra*, 44 Cal.3d at pp. 934, 961-962.)[15] Because California has rejected Oregon's and Oklahoma's narrow view of the legal effect of the defendant's notice of pursuing mental defense, cases from those jurisdictions do not support the Court of Appeal's new prophylactic rules either.

(...continued)
defendant's mind . . . is like taking his fingerprints, his blood, perhaps an electroencephalogram."].) However, the Oregon Supreme Court recently concluded that any attempt to distinguish between the testimonial nature of statements pertaining to conduct and statements regarding mental process was legally untenable, and precluded all compelled questioning. (*State v. Petersen*, *supra*, 218 P.3d at pp. 894-898.)

[15] California is squarely in line with the majority view on this issue. (See 1 LaFave, Substantive Criminal Law (2d Ed. 2003) §8.2(c), pp. 590-591 ["But are such admissions properly admitted as a part of the basis for the expert's opinion on the defendant's sanity? The courts have quite consistently answered in the affirmative, at least where the defendant has asserted an insanity defense and introduced supporting psychiatric testimony."].)

The Court of Appeal also cited *State v. Whitlow* (N.J. 1965) 210 A.2d 763, for the proposition that "[t]he Supreme Court of New Jersey takes a case-specific approach." (Maj. Opn. at p. 28.) However, *Whitlow* provides no support for the appellate court's decision. *Whitlow* adopted an approach identical to that laid out in *Spencer*. (*State v. Whitlow*, *supra*, 210 A.2d at pp. 767-770.) The "case-specific approach" discussed in *Whitlow* related primarily to what sanctions could or should be imposed on defendants who failed to comply with the court-ordered evaluations by refusing to answer examiners' questions, yet still attempted to assert insanity defenses through their own experts. (*Id.* at pp. 770-775.) More important to present case, *Whitlow* recognized that the prosecution would receive the mental evaluation report directly from its expert and suggested the defendant should provide a copy of the defense evaluations to the prosecution in order to receive a copy of the prosecution expert's report. (*Id.* at p. 772.)

Finally, the appellate court cited *United States v. Johnson* (N.D. Iowa 2005) 383 F.Supp.2d 1145, 1154-1161, for its "a thorough discussion of the issue." (Maj. Opn. at pp. 29-30.) Again, *Johnson* fails to support the appellate court's adoption of a prophylactic procedure requiring exclusion of the prosecutor and in camera review by the trial court before disclosure. *Johnson* involves a unique application of the rule that "[b]y tendering his mental condition as an issue in the penalty phase, defendant waived his Fifth and Sixth Amendment rights *to the extent necessary to permit a proper examination of that condition*." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1190, italics added; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 412.)

In *Johnson*, the defendant indicated that she intended to present a mental evaluation in mitigation at her capital penalty phase, but asserted that the mitigation pertained solely to her current mental state and would not implicate the facts of the underlying offense. She therefore sought to

preclude the prosecution experts from questioning her about the underlying offense. (*United States v. Johnson*, *supra*, 383 F.Supp.2d at pp. 1148-1151.) The district court judge in *Johnson* examined the approach taken in various jurisdictions, including Colorado, Oklahoma, New Jersey, and California. *Johnson* recognized that Oregon and Oklahoma represented the minority views on Fifth Amendment waiver, and rejected those approaches. (*Id.* at pp. 1154-1159.) The court followed the approach of New Jersey (acknowledging that California utilized a similar approach). (*Id.* at pp. 1160-1164.)[16] The court ruled that defendant could precluded questioning about circumstances of the crime on a sufficient showing that (1) her proposed mental state mitigation evidence did not implicate those facts; (2) her experts would not question her about the facts; and (3) the prosecution expert would not need such information to evaluate the defendant for rebuttal purposes. (*Id.* at pp. 1162-1165.) *Johnson* concluded that the defendant had taken sufficient steps to affirmatively limit the scope of her Fifth Amendment waiver by narrowly tailoring the nature of her proposed mental state mitigation evidence for her capital penalty phase, which in turn limited the scope of the prosecution expert's questioning.

Johnson is notable for not setting out a general rule that prophylactic measures are constitutionally compelled. The court addressed a factual scenario in which the defendant took very specific steps to limit the scope of her Fifth Amendment waiver and to demonstrate that the prosecution's ability to meet the defense mental state evidence was not impacted by the proposed limitations. Indeed, *Johnson* observed that the defendant's effort to limit the scope of her waiver was effective *only* because she offered her

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[16] The judge in *Johnson* expressed uncertainty about how California would apply its rule in these circumstances and thus was unwilling to say California's rule was equivalent to New Jersey's. (*United States v. Johnson*, *supra*, 383 F.Supp.2d at p. 1159.)

mental state evidence solely under the catchall mitigation penalty factor, which thus could be divorced entirely from the facts of the offense. (*Id.* at pp. 1161-1162.) Consequently, *Johnson* does not support the Court of Appeal's conclusion that prophylactic measures should be imposed even absent circumstances reflecting an effort to limit the scope of the defendant's waiver of rights.

Those measures not only lack constitutional foundation, they are contrary to the statutory framework created by the Legislature and do little to address the concerns identified by the Court of Appeal. First, newly modified section 1054.3 sets out appropriate procedures for requiring a defendant to submit to a mental examination by the prosecution's experts, and those procedures do not contemplate the type of in camera hearing imposed by the appellate court. Section 1054.3, subdivision (b)(1)(B) provides in relevant part:

> The prosecuting attorney shall submit a list of tests proposed to be administered by the prosecution expert to the defendant in a criminal action or a minor in a juvenile proceeding. At the request of the defendant in a criminal action or a minor in a juvenile proceeding, a hearing shall be held to consider any objections raised to the proposed tests before any test is administered. Before ordering that the defendant submit to the examination, the trial court must make a threshold determination that the proposed tests bear some reasonable relation to the mental state placed in issue by the defendant in a criminal action or a minor in a juvenile proceeding. For the purposes of this subdivision, the term "tests" shall include any and all assessment techniques such as a clinical interview or a mental status examination.

The statute provides for a threshold determination of reasonable relevance and a hearing to address the defendant's objections before any

test is administered.[17] The statute does not mandate barring the prosecution from the evaluation, nor contemplate a subsequent in camera hearing excluding the prosecution, as crafted by the Court of Appeal.

Second, holding a pretrial, in camera hearing is the least efficient and effective means of evaluating and resolving a claim that the defendant's statements to the court-appointed or prosecution-retained expert exceed the scope of the defendant's waiver. The scope of the examination is necessarily tailored to the proposed mental defense identified by the defendant before trial. However, at the time of the in camera hearing, any possible Fifth Amendment violation is still inchoate, because the true breadth of the defendant's waiver is still nascent and undefined. The actual form of the defendant's mental defense and the concomitant scope of his waiver is not fully realized until the defendant puts on his defense at trial. At that point, the trial court will have to revisit the question of the actual scope of the waiver, rendering the earlier in camera hearing duplicative at best and pernicious at worst.

Assume this petitioner decides not to put on the mental defense after all. The prosecutor will then be precluded from introducing any evidence from petitioner's examinations. The in camera hearing required by the Court of Appeal would have been an empty exercise. In that situation, petitioner remains fully protected by the use and derivative use immunity that attaches to his statements to the experts and that protection necessarily expands to cover any statements not subject to waiver.

On the other hand, assume petitioner puts on a more expansive mental defense than was anticipated by the trial court. The prosecution may well

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[17] It is at this stage that the defendant has an opportunity to make a showing such as was advanced in *United States v. Johnson*, *supra*, 383 F.Supp.2d 1145.

be entitled to present additional information obtained by its experts. Having been barred from the in camera hearing, however, the prosecution would be unaware of what information was redacted and, thus, would be unfairly precluded from presenting relevant and available rebuttal evidence. (Accord, *Phillips v. Araneta*, *supra*, 93 P.3d at pp. 483-484 ["[W]e decline to require the 'seal and gag' procedure required by federal law. We agree with the State that such a procedure could severely encumber the State's ability to rebut the defendant's mental health-related mitigation evidence," footnote omitted].)

The latter scenario demonstrates the nonstatutory in camera procedure created below has a clear potential to result in the exclusion of relevant evidence at the trial when such exclusion is not otherwise constitutionally compelled. To that extent, it runs afoul of Article I, section 28, subdivision (d) of the California Constitution. (*In re Lance W.* (1985) 37 Cal.3d 873, 879, 890.)

The use of an in camera hearing procedure excluding the prosecutor, during which the court and the defense identify and redact potentially protected statements from the examination materials, also creates a serious trap for the prosecutor. Because the prosecutor is not privy to the information that has been excised, he or she may inadvertently elicit such information from the examiner by asking an innocuous question. The prosecutor may also be penalized if the expert volunteers improper information, having not been forewarned by the prosecutor about the information that was deemed inadmissible at the in camera hearing. Burdening the prosecutor with this risk of error is unwarranted when the defendant's Fifth Amendment rights are fully protected by the availability of use and derivative use immunity. That protection is best applied in light of the scope of the actual waiver as determined once the defendant presents his defense.

The Court of Appeal's justification for its novel procedure potentially applies to any pretrial order that an accused submit to a court-appointed or prosecution-retained examiner's mental evaluation. Consequently, the opinion below effectively requires every trial court to follow the one-size-fits-all procedures set out therein. As those procedures are neither constitutionally compelled nor consistent with statute, they should be disapproved.

II. THE COURT OF APPEAL'S PRETRIAL WRIT REVIEW OF THE PROTECTIVE ORDER WAS IMPROPER BECAUSE APPEAL IS AN ADEQUATE REMEDY TO VINDICATE DEFENDANT'S FIFTH AND SIXTH AMENDMENT TRIAL RIGHTS

Pretrial writ review was an inappropriate device to resolve petitioner's dispute with the respondent court's about the protective orders in his case. As Justice Needham notes in his dissent, "The delay occasioned by interim review of discovery orders is usually worse for the judicial system than the harm caused by the order. (*Save-On Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1, 5 (*Save-On*).)" (Dis. Opn. at p. 5.)

Petitioner has secured from the Court of Appeal a lengthy stay of the trial and a peremptory writ directed at foreclosing a possible future violation of his Fifth Amendment right—one which may never occur with or without the prophylactic measures he seeks. The compelled disclosure to the experts is predicated entirely on petitioner's stated intent to present a mental defense at trial. He is, of course, free to change his mind. To the extent his actual waiver may differ from the scope of his pretrial tender of the defense, his beneficial interest in relief broader than that granted by the respondent court is purely speculative, and will remain so until trial.

More importantly, petitioner is already protected by the use and derivative use immunity that attaches to any compelled disclosures beyond the scope of his waiver. No need exists for pretrial writ review to resolve speculative claims about what measures might be preferred as an abstract

matter. Indeed, petitioner is in no position to seek actual limitations on the materials the prosecution may use on rebuttal until the scope of his mental defense is placed before the respondent court at trial. (See *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1100 ["In reality, perhaps the most fundamental reason for denying writ relief is the case is still with the trial court and there is a good likelihood purported error will be either mooted or cured by the time of judgment."].)

In criminal as well as civil proceedings, review of interlocutory rulings of trial courts by extraordinary writ generally is available only if there is no adequate remedy by appeal." (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 263; *Joe B. v. Superior Court* (2002) 99 Cal.App.4th 23, 27.) Because the scope and nature of any alleged constitutional violations cannot actually be known until the defense is shown and the prosecution proffers challenged material in rebuttal, appeal is not merely an adequate remedy, it is the superior one. (See, e.g., *People v. Wallace* (2008) 44 Cal.4th 1032, 1087 [resolving on appeal claim that trial court's rulings violated *Verdin v. Superior Court*, *supra*, 43 Cal.4th 1096].)

The Court of Appeal justified pretrial writ review by relying on cases involving the possible breach of a statutory privilege, such as the attorney-client privilege, or psychotherapist-patient privilege. (Maj. Opn. at pp. 8-9; see generally *Story v. Superior Court*, *supra*, 109 Cal.App.4th 1007, 1013 ["Writ review of discovery orders is appropriate where the order may undermine a privilege, 'because appellate remedies are not adequate once the privileged information has been disclosed.' [Citation.]"].) As explained above, statutory privileges are protected from discovery because the release of such information, by itself, undermines the relationship between the parties that the privilege is designed to foster and protect. For Fifth Amendment purposes, the harm arises not from disclosure, but from use. Judicial intervention through extraordinary writ review of these

protective orders was unwarranted in the pretrial discovery phase because threatened *use* has not arisen. *Spencer* and *Kastigar* provide ample protection against improper use, and thus an accused in petitioner's position awaiting compelled psychiatric evaluation is necessarily subject to no immediate threat of impingement on his constitutional rights.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of the Court of Appeal be reversed and the petition for writ of mandate dismissed.

Dated: October 8, 2010

Respectfully submitted,

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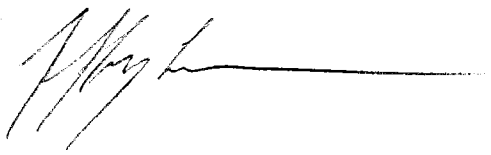

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CERTIFICATE OF COMPLIANCE

I certify that the attached REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 12,506 words.

Dated: October 8, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Maldonado v. Superior Court of San Mateo County; People of the State of California**

No.: **S183961**

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 October 8, 2010, I served the attached **REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS** 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 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, 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 October 8, 2010, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature