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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

SUPREME COURT
FILED

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San Mateo County Superior Court, Case No. SC065313
The Honorable Mark R. Forcum, Judge

REPLY BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
STAN HELFMAN
Supervising Deputy Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
JEFFREY M. LAURENCE
Deputy Attorney General
State Bar No. 183595
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5897
Fax: (415) 703-1234
Email: Jeff.Laurence@doj.ca.gov
Attorneys for Real Party in Interest

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ARGUMENT

I. PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT JUSTIFY THE PROTECTIVE PROCEDURES MANDATED BY THE COURT OF APPEAL

Petitioner devotes the majority of his answer brief to engaging in an extended disquisition on the history and nature of the Fifth Amendment as an abstract principle. Petitioner uses this discussion as the springboard for his argument that the Fifth Amendment precludes the trial court from ordering him to submit to a pretrial mental examination based solely on his notice of intent to present a mental defense. The central premise of petitioner's claim is that the trial court can compel a mental examination only if the defendant waives his Fifth Amendment privilege, and that such a waiver occurs only at trial. Petitioner's claim is beyond the scope of this Court's grant of review, and it is incorrect. The legal justification for compelling a pretrial mental examination is not predicated on a traditional waiver of the Fifth Amendment, but rather the need for a fair state-individual balance in the criminal truth-finding process.

A. Petitioner's Challenge to the Mental Examination is Outside the Scope of This Writ Proceeding

Petitioner's general challenge to the trial court's authority to order him to submit to a mental evaluation by the prosecution's or court-appointed experts is foreclosed because that question is not currently before this Court. The instant review issue concerns the Court of Appeal's decision on petitioner's second petition for writ of mandate. That petition did not concern the authority of the trial court to order a mental examination, but, instead, the trial court's denial of petitioner's requested protective measures, including a request that the results of the mental evaluation be sealed. The Court of Appeal noted in its recent decision, "The trial court's authority to order Maldonado to submit to a psychiatric

examination is not contested in this writ proceeding." (Maj. Opn. at p. 17.) It further explained: "The questions we consider are: (1) when, and under what circumstances, are the examination results, to be disclosed to the prosecution, and (2) whether the prosecution may properly have any role in the selection of court appointed experts to conduct the examinations." (Maj. Opn. at 17.)

The People's petition for review focused solely on the prophylactic measures imposed by the Court of Appeal in that decision. This Court granted the People's petition and denied petitioner's petition for review, which challenged the trial court's authority to order the mental examination. As detailed in our opening brief, petitioner had challenged the trial court's authority to direct a mental evaluation in an earlier unsuccessful petition for a writ of mandate, not in the second writ petition granted by the Court of Appeal. Indeed, the Court of Appeal summarily denied that earlier petition (*Maldonado v. Superior Court*, A125920), and this Court denied review of that order on September 23, 2009 (*Maldonado v. Superior Court*, S176084). There is no justification for a successive writ application on an issue extraneous to the protective orders under review.

Accordingly, the constitutionality of the trial court's authority to order a defendant to submit to a mental examination prior to his presentation of his mental defense is not properly before this Court. (Cal. Rules of Court, rules 8.500, 8.516; see also *Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 654, fn. 2; *In re Matthew C.* (1993) 6 Cal.4th 386, 390, fn. 4; *Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 98-99.)

B. The Court-Ordered Pretrial Mental Evaluation Does Not Violate Petitioner's Fifth Amendment Rights

Petitioner's claim also fails on the merits. Petitioner's claim is predicated entirely on the assertion that the Fifth Amendment bars a

compelled examination unless petitioner affirmatively waives his constitutional protection by presenting a mental defense at trial. He contends that actual notice of the defense's intent to present a mental defense to the charges is not a true waiver of his Fifth Amendment privilege. (PBM at pp. 12-17.)

The flaw in petitioner's argument is its near-exclusive focus on true waiver. Petitioner dismisses prevailing case law explaining that a compelled examination under these circumstances is justified under the Fifth Amendment as a matter of fundamental fairness, based on the need to maintain a fair state-individual balance. (See, e.g., *United States v. Byers* (D.C. Cir. 1983) 740 F.2d 1104, 1111-1116 (en banc) (plur. opn. of Scalia, J.).) Justice Scalia observed in *Byers* that courts have repeatedly rejected claims that compelled mental evaluations violate the Fifth Amendment precisely because of the policy considerations that ensure fairness in the trial process.

> Whether they have described this policy as the need to maintain a "fair state-individual balance" (one of the values underlying the Fifth Amendment set forth in *Murphy v. Waterfront Commission*, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596, 12 L.Ed.2d 678 (1964) (citation omitted)), *see, e.g.*, *United States v. Albright*, *supra*, 388 F.2d at 724; *United States v. Bohle*, *supra*, 445 F.2d at 67, or as a matter of "fundamental fairness," *see, e.g.*, *Pope v. United States*, *supra*, 372 F.2d at 720, or merely a function of "judicial common sense," *see, e.g.*, *Alexander v. United States*, *supra*, 380 F.2d at 39; *United States v. Reifsteck*, *supra*, 535 F.2d at 1034, 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.

(*Id.* at p. 1113.)

Byers pointed out that the Supreme Court had previously rejected an overly mechanistic approach to evaluating the protection afforded by the

Fifth Amendment privilege. The court explained that the protections must in appropriate circumstances give way to practical necessities.

> Our judgment that these practical considerations of fair but effective criminal process affect the interpretation and application of the Fifth Amendment privilege against self-incrimination is supported by the long line of Supreme Court precedent holding that the defendant in a criminal or even civil prosecution may not take the stand in his own behalf and then refuse to consent to cross-examination. *See, e.g.*, *Fitzpatrick v. United States*, 178 U.S. 304, 20 S.Ct. 944, 44 L.Ed. 1078 (1900) (criminal prosecution); *Brown v. United States*, 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958) (civil denaturalization proceeding).

(*Byers*, *supra*, at p. 1114.)

Byers quoted the Supreme Court's decision in *Brown v. United States*, explaining that, when a defendant attempts to utilize the Fifth Amendment not as a shield, but as a sword to subvert the factfinding process, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." (*United States v. Byers*, *supra*, 740 F.2d at p. 1114, quoting *Brown v. United States* (1958) 356 U.S. 148, 155-156 (footnote & citation omitted); see also Slobogin, *Estelle v. Smith: The Constitutional Contours Of The Forensic Evaluation* (1982) 31 Emory L.J. 71, 100 ["As Justice Frankfurter's language suggests, the defendant who takes the stand may be compelled to talk, not because he has 'waived' his Fifth Amendment privilege, but because his direct testimony standing unchallenged would tip the state-individual balance in his favor. [¶] Similarly, as *Estelle* implies, fairness considerations also should limit the scope of the Fifth Amendment in the post-notice context."].)

Byers's conclusion that the Fifth Amendment allows compelled mental examinations predicated not on a true waiver theory, but rather on

the basis of preserving fairness in the trial process, has been embraced by numerous state and federal courts, and constitutes the majority view. (See, e.g., *Mitchell v. State* (Nev. 2008) 192 P.3d 721, 725-726 ["Several federal appellate courts have determined that a trial court may order a defendant to undergo a psychiatric examination when his or her sanity is at issue. Essentially, these courts base their reasoning on the following three rationales: (1) the defendant placed his or her mental state into issue, (2) society requires the court to strike a "'fair state-individual balance,'" and (3) the examination is the most reliable means for the state to assess the defendant's mental capacity. [¶] We find the reasoning of these federal appellate courts compelling and conclude that an application of these principles in the instant case militates in favor of allowing the district court to order, and the State to introduce the results of, a compulsory psychiatric examination." (Footnote and citations omitted)]; *State v. Goff* (Ohio 2010) ___ N.E.2d ___ [2010-Ohio-6317 at ¶ 58] ["Based on the above authority, we conclude that when a defendant demonstrates an intention to use expert testimony from a psychiatric examination . . . a court may compel the defendant to submit to an examination by another expert without violating the defendant's rights under . . . the Fifth Amendment to the United States Constitution."]; *State v. Martin* (Tenn. 1997) 950 S.W.2d 20, 24; *State v. Huff* (N.C. 1989) 381 S.E.2d 635, 660, vacated and remanded on other grounds, 497 U.S. 1021 (1990); *Porter v. State* (Miss. 1986) 492 So.2d 970, 973; accord, *United States v. Phelps* (9th Cir. 1992) 955 F.2d 1258, 1263 ["As an additional reason for finding that Phelps' privilege against self-incrimination was not violated, we embrace the reasoning of the D.C. Circuit in [*Byers*]"]; see generally 1 LaFave, Substantive Criminal Law (2d Ed. 2003) §8.2(c), p. 593 ["Such practical considerations of what constitutes a fair but effective criminal process are rightly taken into

account in determining the reach of the Fifth Amendment privilege against self incrimination."].)

Consistent with the view of the majority of jurisdictions to have considered these issues, a defendant's action of placing his mental state at issue either through a specific plea, such as a plea of not guilty by reason of insanity (Pen. Code §§ 1016, 1026), or by providing notice pursuant to the discovery statutes that he will present a mental expert (Pen. Code § 1054.3), is sufficient to trigger the right of the court to direct the defendant to submit to a mental examination by the prosecution. Although courts have often couched such an event in terms of the defendant's "waiver," a court-ordered mental examination is, ultimately, justified under the Fifth Amendment due to the concerns discussed above regarding fairness and the search for truth. As summarized by one Court of Appeal:

> A defendant who places his mental condition in issue may be subjected to a mental examination by the prosecution to test his claim. (*People v. Carpenter* (1997) 15 Cal.4th 312, 412.) A defendant who tenders his mental condition as an issue waives his or her Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel to the extent necessary to permit a proper examination of that condition. (*Ibid.*) Any other result would "give an unfair tactical advantage to defendants." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1190.)

(*People v. Centeno* (2004) 117 Cal.App.4th 30, 40, disapproved on other grounds by *Verdin v. Superior Court* (2008) 43 Cal.4th 1096.)

This Court therefore can find that notice triggers the requirement of a reciprocal mental evaluation pursuant to section 1054.3, subdivision (b).[1] It is true that a notice of intent to present a mental defense is not a Fifth

[1] In this case, petitioner complied with the discovery requirements by turning over his expert's reports and has consistently reaffirmed his intent to present a mental defense at trial. (PBM at p. 31 ["Maldonado intends to present mental health evidence to the jury as part of his defense in this non-capital case."].)

Amendment *waiver* of rights. But that point says far less than petitioner's argument implies. It merely means that petitioner is entitled to change his mind. He could decide not to pursue a mental defense at trial, or he can enter another plea that is inconsistent with that defense.[2] Notwithstanding the theoretical possibility that a mental defense might never be introduced into evidence at a trial, Penal Code section 1054.3 requires that if a defendant intends to present a mental defense through expert testimony, he must provide notice and disclosure to that effect. When petitioner provided notice of such intent here, the respondent court was entitled to take him at his word and compel a mental examination.

These fairness and truth-seeking justifications for allowing a compelled pretrial examination result in a two-step process. The defendant's notice permits the compulsory evaluation of the defendant by court-appointed or prosecution-retained experts. And his actual introduction of evidence of a mental defense to a charge allows the *use* of the prosecution's mental exam in rebuttal. As Justice Scalia explained in *Byers*, "when a defendant raises the defense of insanity, he may constitutionally be subjected to compulsory examination by court-appointed or government psychiatrists . . . ; and when he introduces into evidence psychiatric testimony to support his insanity defense, testimony of those examining psychiatrists may be received (on that issue) as well." (*United States v. Byers*, *supra*, 740 F.2d at p. 1115.)

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[2] Likewise, a defendant may withdraw a not-guilty-by-reason-of-insanity ("NGI") plea at any time. The only caveat on withdrawal of an NGI plea is that, if the defendant has already been found guilty in the first phase, the court must inform the defendant of his rights under *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1970) 1 Cal.3d 122, because withdrawal will result in an immediate conviction. (*People v. Redmond* (1971) 16 Cal.App.3d 931, 938-939; see also *People v. Guerra* (1985) 40 Cal.3d 377, 384.)

Petitioner questions the appropriateness of a fairness-based balancing approach to the Fifth Amendment. He cites a dissenting opinion by Justice Scalia challenging the balancing approach that formerly prevailed with respect to the Sixth Amendment confrontation clause. (PBM at p. 27, citing *Maryland v. Craig* (1990) 497 U.S. 836, 870 (dis. opn. of Scalia, J.).) Petitioner's reliance on a dissenting opinion pertaining to a distinctly different constitutional right is unpersuasive. More fundamentally, his challenge disregards the Supreme Court's recognition in *Brown v. United States* of the balancing of interests underlying the Fifth Amendment privilege. (*Brown*, *supra*, 356 U.S. at pp. 155-156; see also *United States v. Balsys* (1998) 524 U.S. 666, 691-698 [balancing the interests to determine scope of Fifth Amendment as applied to possible prosecutions in foreign jurisdictions]; *id.* at p. 696 [noting "any extension [of the privilege] would depend ultimately on an analysis of the likely costs and benefits of extending the privilege as Balsys requests"].) Petitioner's claim also ignores the Supreme Court's evident approval of *Byers*'s reliance on fairness as demonstrated by its approving citation to *Byers* in *Buchanan v. Kentucky* (1987) 483 U.S. 402, 422-423.

Petitioner's passing reference to *Lefkowitz v. Cunningham* (1977) 431 U.S. 801 (PBM at p. 29), does not support his challenge to *Byers*'s approach. *Lefkowitz v. Cunningham* addressed a New York law that required certain public officials to waive Fifth Amendment immunity at grand jury proceedings or face immediate removal and disqualification from public office. (*Id.* at p. 803.) Petitioner has not been forced to waive his Fifth Amendment rights as in *Lefkowitz*. He remains free to withdraw his defense before trial without consequence. In that event, his statements would be protected against use and derivative use.

Petitioner's reliance on *Blaisdell v. Commonwealth* (Mass. 1977) 364 N.E.2d 191, is also misplaced. The Massachusetts Supreme Court, in

subsequently applying *Blaisdell*, has endorsed *Byers*'s recognition of the need to consider fundamental fairness in interpreting the scope of the Fifth Amendment. (See *Commonwealth v. Diaz* (Mass. 2000) 730 N.E.2d 845, 852 ["Such a rule allows for reciprocal discovery of psychiatric defenses and promotes 'society's conduct of a fair inquiry.' *Commonwealth v. Wayne W.*, 414 Mass. 218, 231, 606 N.E.2d 1323 (1993) (quoting *United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984))"].) Consistent with *Byers*, petitioner may not resort to a mental defense while at the same time barring the prosecution from access to the critical information solely within his control. (*United States v. Byers*, *supra*, 740 F.2d at pp. 1111-1114.) Accordingly, petitioner's arguments challenging the trial court's authority to order an examination in the absence of a formal waiver are unavailing.

C. Pretrial Disclosure Does Not Violate Petitioner's Fifth Amendment Rights

Petitioner's contention that pretrial disclosure of the compelled examination to the prosecution violates his Fifth Amendment privilege fails for the same reason as his challenge to the trial court's authority to order such an examination: it is wrongly predicated on a waiver theory. As explained above, the constitutional legitimacy of the compelled mental evaluation is founded on basic fairness, not actual waiver. This principle of maintaining a fair state-individual balance is invoked not by waiver, but by the defendant's notice of intent to present a mental defense. And this same fairness principle authorizing a compelled examination likewise justifies the prosecution's observation of the examination, participation in any in camera hearing, and timely receipt of the evaluation results, without regard to actual waiver.

Of course, waiver does ultimately play a role. The defendant's actual waiver through presentation of his mental state evidence at trial is the triggering event that permits the state's legitimate *use* of the results of a

compelled mental examination in its rebuttal case, consonant with the Fifth Amendment. The distinction between access before trial and use at trial flows from the fact that the Fifth Amendment is, at its core, a trial right. A defendant's Fifth Amendment rights are not violated by mere access to the information, but by its improper *use* at trial. (*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"]; *United States v. Verdugo-Urquidez* (1990) 494 U.S. 259, 264 ["The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. [Citation.] Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial."]; *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 727.) Because the need for a fair state-defendant balance and for furthering the truth-finding process permits the court, consistent with the Fifth Amendment, to order a pretrial mental examination, the statements obtained through that examination are not the product of a *violation* of the defendant's right against self-incrimination. By parity of reasoning, pretrial access of the prosecution to those statements does not violate the privilege. Indeed, fairness requires the prosecution have sufficient opportunity to evaluate the mental exam and prepare cross-examination and rebuttal.

Moreover, California provides all the protection constitutionally necessary to ensure that the prosecution makes no improper *use* of a defendant's compelled statements. The justification for pretrial evaluation and disclosure is predicated on the fair assumption that a defendant providing notice of intent to present a mental will ultimately present such a defense at trial, thereby allowing for use of his compelled mental evaluation in rebuttal. However, as discussed above, the notice of intent is not

binding, and a defendant is free to change his mind before putting on a defense case. If he declines to present his defense, the results of the mental evaluation, although properly obtained by the prosecution, cannot be used by it as evidence at trial. Indeed, this Court has ruled that until the defendant presents his mental defense, the prosecution cannot use his compelled evaluation or the fruits of that evaluation at trial. (*In re Spencer* (1965) 63 Cal.2d 400, 414-416.) The scope of this judicial protection is equivalent to the use and derivative use immunity set out in *Kastigar v. United States* (1972) 406 U.S. 441, 453.

Courts have consistently found these protections to be sufficient to permit a compelled pretrial mental examination and to allow the pretrial disclosure of the results to the prosecution. As the Tennessee Supreme Court observed in rejecting a challenge to its rule of court authorizing compelled mental examinations,

> We conclude that Rule 12.2(c) safeguards the defendant's right against self-incrimination under the United States and Tennessee Constitutions. The defendant must initiate the process by providing notice of his or her intent to rely on a mental responsibility defense and to introduce expert testimony on the issue. The prosecution may request, and the trial court may order, that the defendant undergo a psychiatric examination so as to inquire further into the defendant's mental state. The prosecution's use of the defendant's statements, or the "fruits" derived from such statements, is expressly limited to impeachment or rebuttal of the evidence concerning mental state introduced by the defendant. In other words, such material may not be used by the prosecution to prove the guilt of the defendant and may not be used if the defense does not introduce testimony at trial on mental condition. Moreover, because the defendant likewise has access to the information generated by the examination, he or she is free to object in limine to any material on the basis of privilege, relevance, or any other ground. Tenn. R. Crim. P. 12.2(b).
>
> These limitations, in our view, achieve the balancing of interests stressed not only in *Estelle*, *supra*, but also in virtually

> every other case decided on the issue. Accordingly, we reject the defendant's argument that further safeguards, such as recording the examinations or allowing third persons to monitor the examinations, are necessary to preserve the right against self-incrimination. 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." Such a restriction defeats the balancing outlined above and also begs the question of how the prosecution would recognize appropriate impeachment or rebuttal without access to the material.

(*State v. Martin*, *supra*, 950 S.W.2d at pp. 24-25.)[3]

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[3] Tennessee Rules of Criminal Procedure 12.2(b)(1) & (c) provide in relevant part:

> (b) Expert Testimony of Defendant's Mental Condition.
>
> (1) *Notice of Expert Testimony.* A defendant who intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of his or her guilt shall so notify the district attorney general in writing and file a copy of the notice with the clerk.
>
> . . . [¶] . . .
>
> (c) Mental Examination of Defendant.
>
> (1) *Authority to Order Mental Examination.* On motion of the district attorney general, the court may order the defendant to submit to a mental examination by a psychiatrist or other expert designated in the court order.
>
> (2) *Inadmissibility of Statements During Examination.* No statement made by the defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on such statement, and no other fruits of the statement are admissible in evidence against the defendant in any criminal proceeding, except for impeachment purposes or on an issue concerning a mental condition on which the defendant has introduced testimony.

Procedural rules of numerous other states provide express authorization for pretrial disclosure of evaluation results to the prosecution in circumstances similar to this case. (See, e.g., 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]; Mo. Rev. Stat., § 552:030; 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]; Pa. Rules Crim. Proc., rule 569(B)(3) [providing for disclosure of mental examination report to parties within a reasonable time after conclusion of evaluation]; Va. Code Ann. § 19.2-169.5; Wash. Rev. Code §§ 10.77.060-10.77.065; 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].)

Petitioner finely parses these statutes and court rules in an effort to distinguish his case from the procedures authorized in those other jurisdictions. (PBM at pp. 42-45.) He observes that several rules pertain to claimed insanity rather than to a mental defense negating mens rea. (PBM at pp. 42-45.) But distinctions drawn between insanity and a mental defense negating factual guilt of a crime reflect a state's traditional prerogative to define crime and allocate punishment. More importantly, as we noted in our opening brief, the majority of courts draw no distinction under the self-incrimination clause between sanity and guilt determinations in relation to a compelled mental examination. (See *Commonwealth v. Morley* (Pa. 1996) 681 A.2d 1254, 1257, fn.4 [noting that "courts have overwhelmingly rejected this distinction [between an insanity defense and

mental infirmity defenses] as being irrelevant in determining whether a defendant retains the privilege against self-incrimination during the psychiatric interview," and listing cases]; see also *Mitchell v. State*, *supra*, 192 P.3d at pp. 724-726 [analyzing cases].)

Petitioner also contends that several state rules authorizing early disclosure of evaluation results have not been "tested" under the Fifth Amendment in published cases. Petitioner's claim fails to acknowledge that state legislatures are required to consider constitutional limitations when enacting legislation, and consequently legislative enactments are presumed constitutional. (*Greene v. Marin County Flood Control and Water Conservation Dist.* (2010) 49 Cal.4th 277, 291; see generally *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180 ["[O]ur past cases establish that the presumption of constitutionality accorded to legislative acts is particularly appropriate when the Legislature has enacted a statute with the relevant constitutional prescriptions clearly in mind. [Citation.] In such a case, the statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision. Although the ultimate constitutional interpretation must rest, of course, with the judiciary [citation], a focused legislative judgment on the question enjoys significant weight and deference by the courts."].)

Petitioner also challenges our citation to Georgia case law by pointing to *State v. Johnson* (Ga. 2003) 576 S.E.2d 831, which he contends limits Georgia's approach to pretrial disclosures. (PBM at p. 43.) But *Johnson* does not advance petitioner's claim. The defendant in *Johnson* gave notice that he would present mental evidence as mitigation in the penalty phase of his capital trial. The Georgia Supreme Court upheld the trial court's order that the results of the compelled examination by a prosecution expert to rebut penalty phase evidence should remain sealed until after the guilt phase. (*Id.* at pp. 832-834.) That court did not hold, however, that the trial

court's sealing order was constitutionally compelled. It merely upheld the sealing as an appropriate exercise of discretion. Indeed, it noted that the release of the information before the guilt phase might be appropriate on a better showing of need by the prosecution. (*Id.* at p. 834.) More to the point, the *Johnson* court affirmed that the results should be unsealed and disclosed to the prosecution *prior* to the penalty phase, as soon as the defendant announced an intention to rely on mental evidence for mitigation. (*Ibid.*)

Johnson is, thus, most notable for the fact that the decision to unseal the examination results was still predicated on fairness to the prosecution, not on a true waiver after the defendant presented a mental defense in mitigation. This result is fully consonant with pretrial disclosure in our case, which involves a unitary trial with no penalty (or sanity) phase. Petitioner has provided notice of his intent to present a mental defense in the defense case on guilt. Thus, disclosure to the prosecution prior to the start of trial (the relevant phase involving petitioner's mental defense) is appropriate, just as disclosure prior to the start of the penalty phase in *Johnson* was appropriate.[4]

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[4] This Court has recognized that discovery of defense penalty phase mitigation evidence or witnesses in a capital case may, in appropriate cases upon a showing of good cause, be delayed until after resolution of the guilt phase. (*People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1237-1239.) Other jurisdictions take varied approaches to the timing of disclosure when the mental defense pertains solely to a post-guilt phase in a bifurcated trial. For example, in *Commonwealth v. Sartin* (Pa. 2000) 751 A.2d 1140, the Pennsylvania Supreme Court held that, for an insanity claim, the results should be sealed until the conclusion of the guilt phase, suggesting that disclosure should wait until the trial phase for which they are relevant. (*Id.* at p. 1142-1144.) As noted by the dissent, this sealing procedure was not constitutionally compelled, and did not apply when a mental defense was offered during the guilt phase. (*Id.* at pp. 1145-1147 [dis. opn. of Castille, J.].) By contrast, the Arizona Supreme Court rejected

(continued...)

Contrary to petitioner's assertion, the statutes and rules authorizing pretrial disclosure to the prosecution of compelled examination results reflect an approach common to the majority of jurisdictions that confront the issue in this case. That approach confirms that the Fifth Amendment does not bar either pretrial compelled examinations or pretrial disclosure to the prosecution of the results of the examinations.

D. Use and Derivative Use Immunity Is Sufficient Protection to Safeguard Petitioner's Residual Fifth Amendment Rights

Petitioner also raises several objections to the scope of judicial immunity in his case. His general theme is that the immunity fails to ensure his rights are protected in the event he decides not to present a mental defense at trial. Petitioner's concerns give short shrift to the trial court's traditional discretion to deal with trial issues on a case-by-case basis. His concerns are, thus, unwarranted.

At the outset, petitioner imputes to the Court of Appeal and to the People the view that he is fully protected by, and entitled only to, derivative use immunity, without corresponding use immunity. (PBM at p. 24.) The basis for this claim appears to be his assertion that a true grant of immunity under *Kastigar* would preclude any use of his statements at trial, regardless of whether he presented a mental defense, which is not the case here. Petitioner's argument is off base.

The legal justification for compelling a pretrial mental examination is not a prosecutorial grant of immunity under *Kastigar*, but rather the fairness principles discussed above. The judicial provision of conditional use and

(...continued)
a "seal and gag" approach for pretrial mental exams order to rebut capital penalty phase mental mitigation evidence. (*Phillips v. Araneta* (Ariz. 2004) 93 P.3d 480, 483-485.)

derivative use immunity is a secondary protection. It comes into play only if the defendant decides *not* to pursue the noticed mental defense at trial. If and only if that occurs, the original fairness justification for the pretrial examination dissipates. In that event, use and derivative use immunity are invoked to shield the defendant from any improper use of his pretrial statements or their fruits. (See, e.g., *In re Spencer*, *supra*, 63 Cal.2d at pp. 414-416; *People v. Centeno*, *supra*, 117 Cal.App.4th at pp. 41-44; cf. *People v. Jablonski* (2006) 37 Cal.4th 774, 801-804 [explaining in similar competency context that judicially granted immunity "fully protects a defendant against any nonevidentiary uses of statements obtained from the defendant during the competency hearing to the same extent he or she is protected by the privilege against self-incrimination"].) Such conditional immunity is sufficient to safeguard petitioner's residual Fifth Amendment rights, namely, those rights that would reanimate should he decide not to present a mental defense at trial. Petitioner offers no explanation as to why such judicial immunity, which would preclude any use or derivative use of his statements by the prosecution should petitioner withdraw his mental defense, is insufficient to protect him against improper use of his statements at trial.

Petitioner also briefly echoes a practical concern about the reliance on judicially imposed use and derivative use immunity that was originally noted by the Court of Appeal below. The Court of Appeal suggested that the prosecution faced "risks" in gaining early access to the mental evaluations that may become fully protected if the defendant does not present a mental defense. (Maj. Opn. at pp. 34-35.) The court predicated its decision to fashion additional prophylactic protections on its concerns that a finding by the trial court that the prosecution was privy to constitutionally protected material might require disqualification and further delay. (Maj. Opn. at p. 37.) The court also noted concern regarding

the potential difficulty a defendant may face in demonstrating improper derivative use. (Maj. Opn. at p. 34.) Petitioner attempts to add to these concerns by suggesting in a footnote that even the prosecutor's act of "[p]reparing its case for trial" may be deemed to constitute derivative use of the mental evaluations. (PBM at p. 24, fn.6, citing *United States v. Hubbell* (2000) 530 U.S. 27.) These concerns are both purely speculative and substantially overstated, and would not, in any event, warrant the prophylactic measures imposed by the court below.

In invoking these speculative concerns, the Court of Appeal and petitioner fail to take account of the typical procedural posture of cases at the time of disclosure of a court-ordered mental examination. They also manifestly overstate the likelihood that a necessity for conditional immunity would even arise. On the first point, the defense discovery obligations under Penal Code section 1054.3, requiring disclosure of mental expert witnesses and their reports in support of a mental defense, generally do not come into play until the prosecution's investigative preparation for trial is all but complete. Indeed, the defense is not obligated to turn over such information until it has actually decided to present a mental defense and call the experts as witnesses. (*People v. Tillis* (1998) 18 Cal.4th 284, 293-294; *Sandeffer v. Superior Court* (1993) 18 Cal.App.4th 672, 678.) The timing of such disclosure and the posture of such cases—as being on the verge of trial—serves to distinguish them from *United States v. Hubbell*, relied on by petitioner, in which the prosecution obtained the compelled statements as a prelude to preparing an indictment, when that case was still in the early investigative stage. (See *Hubbell*, *supra*, 530 U.S. at pp. 40-44.)

Moreover, when a defendant provides notice of a mental defense and the intent to present mental experts, as in this case, the defense is obligated under section 1054.3, subdivision (a), to turn over the names and reports of

those experts. Consequently, prior to the court requiring that the defendant submit to an evaluation pursuant to section 1054.3, subdivision (b), the prosecution has (1) already put together its own case for guilt, and (2) received the defense mental experts' reports on the proposed mental defense and presumably begun preparing a rebuttal case. At that juncture, the only thing left is for the prosecution to craft its rebuttal case through the use of its own experts' evaluation of the defendant. The likelihood that something revealed during the compelled examination of the defendant at this stage of the proceeding would lead to new information regarding the prosecution's case-in-chief, motivating the prosecution to conduct further investigation, is remote in the extreme.

On the second point, the need for an inquiry into whether the prosecution made direct or derivative use of the compelled mental examination only arises if the defendant, having already provided notice of a mental defense, actually decides to withdraw his mental defense at trial. As a practical matter, withdrawal of a noticed mental defense at trial is itself unlikely to occur in a meaningful number of cases. And for the few cases in which the defendant does withdraw the defense, little likelihood exists that the prosecution would have any reason to make direct or derivative use of the compelled mental examination. That is because the legal issue to which the evidence was relevant would be moot.

As for petitioner's suggestion that the prosecution's preparation for a possible rebuttal case to a mental defense constitutes derivative use of his compelled statements, that is simply incorrect. "Use," whether direct or derivative, still requires use *at trial*. While the compelled statements need not themselves be used for a violation of immunity requirement to occur, those statements must still have served as some link in a chain leading to evidence that was actually used to secure the prosecution of the defendant for there to be a violation.

"'The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.' [Citation.] [¶] Compelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory. [Citation.]" (*United States v. Hubbell*, *supra*, 530 U.S. at p. 38.) By contrast, when the prosecution's investigation pertains to a mental defense rebuttal strategy that is necessarily abandoned as moot in light of the defense decision not to present a mental defense, the prosecution's mental defense investigation that is likewise not presented cannot be said to constitute a link the chain to any evidence actually used at trial.

Accordingly, the circumstances in which an inquiry into possible improper use or derivative use would be necessary are rare. And the likelihood of a violation by the prosecution of the judicial immunity would be even rarer. Thus, the practical concerns identified by the Court of Appeal and petitioner are substantially outweighed by the burdens on the trial process of delaying disclosure or categorically excluding the prosecutor from any in camera hearing regarding the examiner's reports.

The procedures identified by the trial court, in conformity with newly enacted section 1054.3, subdivision (b), and with *In re Spencer*, *supra*, 63 Cal.2d at pages 414 to 416, are more than sufficient to safeguard a defendant's Fifth Amendment rights while ensuring a fair trial. Petitioner's claims to the contrary are unavailing.

II. PRETRIAL WRIT REVIEW OF THE RESPONDENT COURT'S PROTECTIVE ORDERS IS IMPROPER

We have challenged, as a separate issue, the procedural propriety of the Court of Appeal's pretrial writ review of the respondent court's protective orders. Petitioner's response relies entirely on the Court of

Appeal's reasons for holding that pretrial writ review is appropriate. He offers no further justification. (PBM at p. 46.) Consequently, we rely upon the argument in our merits brief.

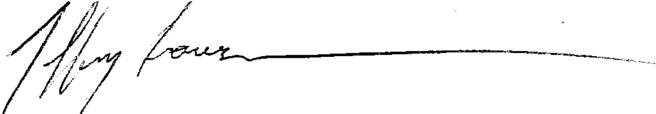
CONCLUSION

Accordingly, real party in interest respectfully requests that the judgment of the Court of Appeal be reversed and the petition for writ of mandate dismissed.

Dated: January 28, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
STAN HELFMAN
Supervising Deputy Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General



JEFFREY M. LAURENCE
Deputy Attorney General
Attorneys for Real Party in Interest

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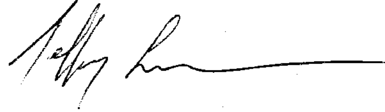
CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF uses a 13 point Times New Roman font and contains 6,399 words.

Dated: January 28, 2011

KAMALA D. HARRIS
Attorney General of California



JEFFREY M. LAURENCE
Deputy Attorney General
Attorneys for Real Party in Interest

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 January 28, 2011, I served the attached **REPLY BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Paul F. DeMeester
Attorney at Law
1227 Arguello Street
Redwood City, California 94063
(2 copies)

First Appellate District, Division Five
Court of Appeal of the State of California
350 McAllister Street
San Francisco, CA 94102
(via hand delivery)

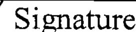
The Honorable Stephen Wagstaffe
District Attorney
San Mateo County District Attorney's Office
400 County Center, Third Floor
Redwood City, CA 94063

Alfred Giannini
San Mateo County District Attorney's Office
400 County Center, Third Floor
Redwood City, CA 94063

County of San Mateo
Main Courthouse-Hall of Justice
Superior Court of California
400 County Center
Redwood City, CA 94063-1655

Attention: Executive Director
First District Appellate Project
730 Harrison St., Room 201
San Francisco, CA 94107

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 January 28, 2011, at San Francisco, California.

J. Wong	
Declarant	Signature