IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

REYNALDO A. MALDONADO,

Petitioner,

vs.

THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO,

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

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Case No. 183961

PETITIONER'S ANSWER BRIEF ON THE MERITS

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

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Issues Presented for Review

1. The Fifth Amendment guarantees that no person shall be compelled in any criminal case to be a witness against himself. The prosecution has requested the trial court to order Maldonado to submit to pretrial mental examinations so as to enable the prosecution to rebut his mental defense. Does the Fifth Amendment require that Maldonado's guarantee be protected by not permitting disclosure of examination discovery to the prosecution until Maldonado presents his mental defense?

2. Recently, this Court decided a statutory interpretation issue involving prosecution-initiated pretrial mental health examinations of criminal defendants (*Verdin*). The case was before this Court on writ review. Is it appropriate for appellate courts to decide constitutional issues on the same topic on writ review?

Introduction

Reynaldo Maldonado intends to present a mental defense at trial. In accordance with California's reciprocal discovery rules, Maldonado provided the prosecution with the reports and underlying data of the mental health professionals who have examined him on behalf of the defense.

In order to prepare for rebuttal, the prosecution has asked the trial court to order Maldonado to submit to pretrial mental health exams to be conducted by government-selected experts.

The convenience of the prosecution runs afoul of the Fifth Amendment, though. On the other hand, conducting the requested exams mid-trial would raise other concerns.

Maldonado's Fifth Amendment right would be protected only by permitting the exams to be conducted before trial (to which Maldonado does not object) but by limiting observance and disclosure thereof to the prosecution until Maldonado's actual Fifth Amendment waiver occurs - if it occurs at all - at the time the defense case is presented.

These protective measures constitute the only procedure to afford Maldonado his Fifth Amendment and related Sixth Amendment right-to-counsel guarantees, while also providing the prosecution with potential rebuttal evidence.

This case presents an open constitutional question, requiring an analysis of the legal effect of the timing of the actual waiver of a defendant's Fifth Amendment right and the scope of that right on the timing of the disclosure to the prosecution of the mental health discovery generated by the court-ordered examinations.

The Court of Appeal answered the question by imposing some protections: excluding the prosecution from observing the exams; and delaying discovery thereof to allow the defendant to litigate privilege objections in camera.

But the appellate court erred in requiring disclosure of any non-privileged material prior to trial. The ruling below does not comport with the Fifth Amendment.

The Court of Appeal was correct, however, in deciding this important issue on writ review.

Statement of the Case and Facts

Maldonado is charged with non-capital special circumstance murder (while lying in wait). (Petn. at 2.) As part of his reciprocal discovery obligations, Maldonado provided the prosecution with the evidence he intends to tender at trial, including: evidence that, as a youth, he had fallen from a bridge and landed on his head amidst rocks some thirty feet below, rendering him unconscious and leading to him suffering chronic headaches; findings by psychologist Jeffrey Kline, Ph.D., that Maldonado has an IQ that puts him in the mildly retarded range and that he suffers moderate to severe neuro-cognitive deficits in a number of areas including visual-spatial construction, visual-spatial memory recall, perceptual organization,

nonverbal problem solving, verbal abstraction, shifting cognitive set, and cognitive processing speed; findings by neuro-psychologist Robert Perez, Ph.D, confirming Dr. Kline's findings after conducting a number of neuro-psychological tests in Maldonado's native language (Spanish); and findings by neurologist Peter Cassini, M.D., whose neurological examination of Maldonado revealed left lateralized hearing deficits (relating to inner ear or central brain impairment, not peripheral ear structure) and visual field deficits. Dr. Cassini recommended conducting magnetic resonance imaging (MRI) of Maldonado's brain, which confirmed the existence of an old brain injury. The three experts' evaluations converge on a finding of Maldonado suffering significant neuro-cognitive deficits suggestive of acquired brain injury and/or congenital brain dysfunction. (Petn. at 12, 20-21.)

Three weeks before the jury trial date, the trial court, over Maldonado's objection, granted the prosecution's motion to compel petitioner to submit to physical, psychological and psychiatric examinations pursuant to Evidence Code section 730.[1] (Petn. exh. 5 at 5.)

As soon as the trial court granted the prosecution's request, Maldonado filed requests for the imposition of protective measures. (Petn. exhs. 2, 4, 5 [at 6], and 6.) They consisted of two sets of requests for

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[1] The prosecution's request predated the enactment of the new provisions of Penal Code section 1054.3, which provide for compelled mental health evaluations of defendants at the request of the prosecution by experts selected by the prosecution when a defendant "places in issue his or her mental state." (§ 1054.3, subd. (b)(1).) The Court of Appeal held that in light of the new provisions, the trial court on remand "may decide to revise its prior order and expressly provide for a prosecution psychiatric examination." (Court of Appeal opn. at 38.) The constitutional analysis is the same whether the examiner is chosen by the court at the prosecution's request or by the prosecution. If anything, section 1054.3's method destroys any semblance of neutrality that might accompany an expert appointment by the court pursuant to Evidence Code section 730.

protective measures: petn. exh. 2 covering request nos. 1-14, and petn. exh. 4 covering request nos. 15-24.

Maldonado's requests were (trial court decision in brackets):

1) To appoint objective evaluators as experts, who are not reputed to be allied to one party or the other in this case [granted; petn. exh. 7 at 25];

2) To inform both parties of the court's intended choices of experts and to allow each party sufficient time to review the qualifications of each expert in order to decide whether or not to object to the appointment of said person as an expert, which objections shall be duly considered by the court and ruled upon [granted; petn. exh. 7 at 27];

3) To allow defense counsel to be present at the examinations [granted in modified fashion; petn. exh. 7 at 29];

4) To allow a defense expert of Maldonado's choosing to be present at the examinations [granted in modified fashion; petn. exh. 7 at 29];

5) To prohibit any district attorney, attorney general, U.S. attorney, or special prosecutor, or any of their respective staff, or any of their law enforcement agents, including but not limited to Daly City Police, San Mateo County Sheriff's Office, from being present during the conduct of the examinations [denied in modified fashion; petn. exh. 7 at 47-48];

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 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 [denied; petn. exh. 7 at 54-55];

7) To decide the question of admissibility of any of the evidence adduced 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 [denied; petn. exh. 7 at 55];

8) To prohibit any officials referred to under item 5 from any contact with any experts appointed by the court 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 [denied; petn. exh. 7 at 55];

9) To require the experts to provide to defense counsel copies of their notes, reports, and recordings within 24 hours of their creation [granted in modified fashion; petn. exh. 7 at 29-30];

10) To require the experts to maintain confidentiality regarding their examinations and investigations, with the exceptions provided for in items 3, 4, and 9 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 [granted in part and denied by implication in part; petn. exh. 7 at 30-31, 54-55];

11) To require the appointed experts to provide defense counsel with five days' notice of any visit said experts pay upon Maldonado for the purposes of their examination of him, in order for defense counsel and the latter's designated expert (see item 4) to be present at any such examination [granted in modified fashion; petn. exh. 7 at 32];

12) To require the appointed experts to meet and confer with defense counsel regarding scheduling their examinations, reasonably calculated to assure defense counsel's and his chosen defense expert's presence [denied; petn. exh. 7 at 33];

13) To require the experts to advise petitioner at the outset of their examination of petitioner's *Miranda* rights (see *Miranda v. Arizona* (1966) 384 U.S. 436) [denied; petn. exh. 7 at 35];

14) To require videotaping of any psychological, neuropsychological or psychiatric examinations, and to require audio-taping only of any

physical examination [granted in part and deferred in part; petn. exh. 7 at 36];

15) The experts be given exactly the same discovery that was made available to Drs. Jeffrey Kline, Peter Cassini (including the Neurostar MRI imaging data) and Robert Perez, in addition to the reports prepared by said doctors - but that the appointed experts not be given any other information besides the items mentioned under item 15 [denied; petn. exh. 7 at 37];

16) The experts be precluded from having the reports of Drs. Jonathan French and Arturo Silva, who were both appointed pursuant to the provisions of Penal Code section 1367 et seq. [granted; petn. exh. 7 at 39];

17) The experts be required to consult with Drs. Kline, Cassini and Perez regarding their respective evaluations and findings, prior to the examinations [denied; petn. exh. 7 at 39];

18) The experts be precluded from discussing the facts of the underlying homicide case with Maldonado and be precluded from asking him questions about it [denied; petn. exh. 7 at 40];

19) The experts be required to provide notice of any testing instruments intended to be used during any examinations of Maldonado, in such fashion as to permit Maldonado to object to any test proposed to be administered, or to any area of inquiry during the examinations; the court will rule on the objections *in camera* and *ex parte* prior to the release of any reports, test data, or client statements obtained during the examinations to the prosecution [denied; petn. exh. 7 at 42];

20) Require that any expert appointed be a neurologist or a neuro-psychologist [granted; petn. exh. 7 at 42];

21) Continue the jury trial until all reports and recordings have been received by the defense and sufficient time has been permitted for the defense to review the reports and recordings in consultation with the

necessary experts [ruling deferred but underlying concerns accommodated informally; petn. exh. 7 at 42-44];

22) If the prosecution calls any court-appointed expert as a witness, that the court conduct a hearing outside the presence of the jury prior to any intended expert testimony before the jury, to determine the scope of allowable testimony by said expert; the court-appointed expert will be required to testify at the non-jury hearing [ruling deferred; petn. exh. 7 at 47];

23) Fashion appropriate limiting instructions, in *sua sponte* manner, if any of the court-appointed experts testify before the jury; either party may submit suggested language to the court for such instructions [deferred; petn. exh. 7 at 44-45];

24) Exclude any experts contacted by the People from consideration and appointment [denied; petn. exh. 7 at 46]; and,

25) Prohibit the People from contacting any other experts for the purpose of possible appointment; the court to direct the Probation Department to select the appropriate experts without any input from either party [denied; petn. exh. 7 at 47].

(See petn. exhs. 2 (request nos. 1-14), and 4 (request nos. 15-25).)

The trial court conducted a hearing on the requests. (Petn. exh. 7.) After ruling on the requests, the court - over Maldonado's objections - appointed psychiatrist Jose R. Maldonado, M.D., neuro-psychologist Shelly Peery, Ph.D., and neurologist Jaime Lopez, M.D. The three experts had been suggested for appointment by the prosecution, which had contacted them and forwarded the names and resumes to the court. (Petn. at 8.)

Maldonado sought relief in the Court of Appeal.[2] The Court of Appeal issued an alternative writ of mandate, commanding the trial court to set aside and vacate its order as to requests numbers 5, 6, 7, 8 and 10, and to enter a new and different order or show cause in the Court of Appeal why a peremptory writ of mandate should not be granted. (*Maldonado v. Superior Court* (Oct. 14, 2009, A126236) [nonpub. order].)

The trial court, at the urging of the prosecution, declined to modify its order. (Return at 6.) On May 13, 2010, the Court of Appeal, one justice dissenting, issued a peremptory writ. (Court of Appeal opn. at 2.) On its own motion, on May 17, 2010, the Court of Appeal modified its opinion changing the judgment. (Modification of opn. at 1-2.)

To protect Maldonado's Fifth Amendment guarantee, the Court of Appeal ordered that: the prosecution is barred from observing the mental health examinations compelled by the trial court at the request of the prosecution; any statements by Maldonado during the course of the examinations remain confidential until further order of the trial court; Maldonado will have an opportunity to assert privilege objections at an in camera hearing; after ruling on those objections, the trial court shall redact any statements it finds to be privileged; and may order the balance of the examination results disclosed to the prosecution with possible limiting conditions. (Modification of opn. at 1-2.)

The Court of Appeal denied Maldonado's request to preclude the prosecution from receiving the results of the compelled mental health evaluations until after the close of the prosecution's case-in-chief and

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[2] The petition was Maldonado's second request for review on the issue of the prosecution's motion for compelled mental health exams. The first quest for review (A125920; S176084) involved the propriety of Evidence Code section 730 as the basis for the prosecution's request. That issue has been mooted by the enactment of the amended Penal Code section 1054.3.

petitioner's confirmation of his intent to offer mental health evidence at trial.[3]

ARGUMENT

SUMMARY OF THE ARGUMENT

Maldonado has a Fifth Amendment right to remain silent in the face of compelled mental health exams. He has a related Sixth Amendment right to counsel in deciding whether to submit to such exams, testify at trial or present evidence.

Of course, he would waive his Fifth Amendment guarantee by presenting his mental health evidence at trial. But such waiver does not take place until the defense case-in-chief.

Compelling Maldonado to submit to mental health exams prior to trial yields incriminating, personal, compelled testimonial statements by him. The Fifth Amendment directly protects Maldonado against such disclosures. Giving the prosecution access in order to observe the exams or learn of their results and content prior to Maldonado actually waiving his Fifth Amendment guarantee violates the defendant's Fifth and Sixth Amendment rights. The constitutional guarantees themselves are violated, not some prophylactic measure designed to safeguard a constitutional right.

Maldonado's compliance with the mandates of reciprocal discovery does not change the operation of his constitutional guarantees. The information Maldonado shared with the prosecution in that regard is outside of the Fifth Amendment protection as it does not involve compelled

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[3] In the trial court, Maldonado had requested that the exam results not be disclosed to the prosecution until after the close of the defense case. (Petn. at 4 [request no 6].) At oral argument in the Court of Appeal, Maldonado agreed upon earlier disclosure after the close of the prosecution case-in-chief and upon confirmation of the defense's intention to present mental health evidence. The Court of Appeal acknowledged petitioner's flexibility. (Court of Appeal opn. at 18, fn. 14.)

statements. Also, complying with reciprocal discovery requirements could never be considered a voluntary waiver of a constitutional right.

I. FIFTH AMENDMENT REQUIRES THAT DISCOVERY RESULTING FROM COMPELLED MENTAL HEALTH EXAMS NOT BE DISCLOSED TO THE PROSECUTION UNTIL SUCH TIME THAT AN ACTUAL WAIVER OF THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION OCCURS DURING THE DEFENSE CASE AT TRIAL

A. Maldonado has a Fifth Amendment right to remain silent at court-ordered mental exams conducted by prosecution agents

The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself ...." Justice Thomas has written - joined by Justice Scalia - that historical "evidence suggests that the Fifth Amendment privilege protects against the compelled production of not just incriminating testimony, but of any incriminating evidence." (*United States v. Hubbell* (2000) 530 U.S. 27, 49 [Thomas, J., concurring opn.]) "A review of that period reveals substantial support for the view that the term 'witness' meant a person who gives or furnishes evidence, a broader meaning than that which our case law currently ascribes to the term."[4] (*Id.*, at 50.) Maldonado urges this Court to adopt this construction.

The clause guarantees Maldonado the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence." (*Malloy v. Hogan* (1964) 378 U.S. 1, 8.) "The provision of the Amendment must be accorded liberal construction in

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[4] Contrast the use of the term "witness" in the Fifth Amendment with the use of the term "witness against him" in the Confrontation Clause of the Sixth Amendment. Writing on behalf of four Justices, Justice Scalia stated: "The phrase obviously refers to those who give testimony against the defendant at trial." (*Maryland v. Craig* (1990) 497 U.S. 836, 865 [Scalia, J., dissenting opn.])

favor of the right it was intended to secure." (*Hoffman v. United States* (1951) 341 U.S. 479, 486.)

The right is not confined to the courtroom. "[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." (*Miranda v. Arizona* (1966) 384 U.S. 436, 467.) *Miranda* held that the Fifth Amendment right applies to custodial interrogations.[5] (*Id.*, at 460-463; *New York v. Quarles* (1984) 467 U.S. 649, 654; *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 589.)

The Fifth Amendment also applies when a mental health professional acts as an agent of the prosecution in examining a defendant in order to secure evidence to help convict that defendant - the precise situation in which Maldonado finds himself. (*Estelle v. Smith* (1981) 451 U.S. 454, 467.)

"[T]he Self-Incrimination Clause is self-executing." (*United States v. Patane* (2004) 542 U.S. 630, 640 [Thomas, J., plurality opn.]) Where the Fifth Amendment right applies, it may be overcome only by either (1) a valid waiver of the right by its holder; or (2) a grant of immunity. (*Rogers v. United States* (1951) 340 U.S. 367, 370-371; *Kastigar v. United States* (1972) 406 U.S. 441, 453.)

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[5] *Miranda* was not the Court's first application of the Fifth Amendment to police interrogations. The Court had expressly applied the Fifth Amendment privilege in ruling that a police interrogation was involuntary in *Bram v. United States* (1897) 168 U.S. 532. *Bram* was a federal criminal case. In state cases - prior to the incorporation of the Fifth Amendment as applicable to the States in *Malloy v. Hogan, supra*, 378 U.S. 1 - the Court based its voluntariness decisions on the Fourteenth Amendment's Due Process Clause. (See *Brown v. Mississippi* (1936) 297 U.S. 278.) The voluntariness doctrine continues, post-*Malloy*, to be rooted in due process. (See *Mincey v. Arizona* (1978) 437 U.S. 385.)

This raises two questions: when does Maldonado waive his Fifth Amendment right against self-incrimination; and, does immunity overcome the exercise of the Fifth Amendment right?

1. Maldonado does not waive his Fifth Amendment right until he presents mental health evidence at trial during the defense case

a. Prosecution agrees that Maldonado does not waive his Fifth Amendment right until he introduces mental health evidence at trial

The prosecution agrees that, in the words of the Attorney General, "[i]f petitioner chooses to present psychiatric evidence at trial, he will waive his Fifth Amendment privilege at that point." (Return at 18; emphasis added.) The Attorney General added that "The People do not contend herein that petitioner already waived his Fifth Amendment privilege by giving notice of his psychiatric defense." (Return at 18, fn. 5.)

b. Constitutional cases confirm that waiver does not occur until mental health evidence is introduced by the defendant

Case law is in accord. "Submitting to a psychiatric or psychological examination does not itself constitute a waiver of the Fifth Amendment's protection." (*Battie v. Estelle* (5th Cir.1981) 655 F.2d 692, 702.) "The waiver doctrine is inapplicable ... when the defendant does not introduce the testimony of a mental health expert on the issue of a mental state relevant to the offense or a defense raised by the evidence in the case." (*Ibid.*)

The United States Supreme Court favorably referred to the Fifth Circuit's *Battie* waiver discussion: "Language contained in *Smith* and in our later discussion in *Buchanan* ... provides some support for the Fifth Circuit's discussion of waiver." (*Powell v. Texas* (1989) 492 U.S. 680, 684.)

The support in *Estelle v. Smith* is found in two passages: the duty to submit to a mental health examination by a prosecution psychiatrist is not triggered until such time as "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony"; and when the Court commented that: "*When* a defendant asserts the insanity defense *and* introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected in the case." (*Estelle v. Smith, supra*, 451 U.S., at 465-466; italics added for emphasis.) The import of this language is unmistaken: a Fifth Amendment waiver does not take place until a defendant introduces relevant evidence.

The *Buchanan* language that the *Powell* Court referred to was interpreted by a federal circuit court to require the actual introduction of psychological evidence in addition to an examination before a waiver of the privilege occurs:

> The Court in *Buchanan*, however ... stated that "if 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."
>
> Although the Court's use of the disjunctive might even suggest that the defendant's request is sufficient by itself to constitute forfeiture of the privilege, the rest of the sentence and the opinion as a whole strongly imply that the defendant must have gone further and actually introduced psychological evidence. (*Schneider v. Lynaugh* (5th Cir.1988) 835 F.2d 570, 577; italics in original, footnote omitted, citing *Buchanan v. Kentucky* (1987) 483 U.S. 402, 422-423.)

The fact that waiver does not occur until the actual introduction of evidence at trial is implicit in Court pronouncements in other cases. "The privilege is waived for the matters to which the witness testifies, and the scope of relevant cross-examination.'" (*Mitchell v. United States* (1999) 526 U.S. 314, 321; citing *Brown v. United States* (1958) 356 U.S. 148, 154-

155.) "[P]etitioner had already 'waived' her privilege of silence when she freely answered criminating questions relating to her connection with the Communist Party." (*Rogers v. United States, supra*, 340 U.S., at 374.)

When Justice Blackmun still served on the Circuit Court, he wrote that:

> We therefore specifically hold that by raising the issue of insanity, by submitting to psychiatric and psychologic examination by his own examiners, *and* by presenting evidence as to mental incompetency from the lips of the defendant and those examiners, the defense raised that issue for all purposes and that the government was appropriately granted leave to have the defendant examined by experts of its choice and to present their opinions in evidence. We further hold that Dr. Smith's testimony was opinion evidence and not hearsay and was properly received.
> (*Pope v. United States* (1967) 372 F.2d 710, 721, sentence vacated and case remanded on other grounds in *Pope v. United States*, 392 U.S. 651; italics added for emphasis.)

A case relied upon by the prosecution in opposition to the Fifth Amendment is in accord: "Hall correctly notes that he did not waive his Fifth Amendment privilege against self-incrimination merely by giving notice of his intention to submit expert psychiatric testimony at the sentencing hearing." (*United States v. Hall* (5th Cir.1998) 152 F.3d 381, 398, abrogated as recognized in *United States v. Martinez-Salazar* (2000) 528 U.S. 304; cited in Opening Brief at 23.)

Plenty of out-of-state authority is in accord: "The mere fact that a defendant gives notice of an intention to interpose a defense of insanity cannot be construed as a waiver of his privilege against self-incrimination for a waiver of that privilege comes about in context of a criminal trial only when the defendant takes the stand to give testimonial evidence in his own behalf." (*Blaisdell v. Commonwealth* (Mass.1977) 372 Mass. 753, 764, 364 N.E.2d 191.)

"Because the defendant has not actually waived his Fifth Amendment protection prior to the presentation at trial of future dangerousness expert testimony, it is crucial for the trial court to protect the defendant's Fifth Amendment rights." (*Lagrone v. State* (Tx.Crim.App. 1997) 942 S.W.2d 602, 612, fn. 8.)

"[A] waiver of the Fifth Amendment only occurs *when* the defendant *offers* 'expert psychiatric evidence.'" (*People v. Diaz* (N.Y.Sup.2004) 777 N.Y.S.2d 856, 864, fn. 7, affirmed in *People v. Diaz* (N.Y.2010) 15 N.Y.3d 40, 930 N.E.2d 264; italics added for emphasis.)

c. Mechanics of waiver demonstrate that waiver does not take place until the defense case at trial

The New Hampshire Supreme Court, including Justice Souter, accurately described how the Fifth Amendment right is waived in this context:

> A defendant performs a functionally similar voluntary act when he calls a psychologist or psychiatrist to testify on his behalf, based on a personal interview with him. This is so because the expert witness depends upon the defendant's own statements of relevant facts as the foundation for the expert's opinion. Presumably, the witness would lack an adequate foundation to form and express such an opinion, and would therefore be barred from giving one, without the defendant's account of the relevant events of his own history and state of mind. Because the expert's testimony is thus predicated on the defendant's statements, the latter are explicitly or implicitly placed in evidence through the testimony of the expert during his direct and cross-examination. Since a defendant would waive his privilege against compelled self-incrimination if he took the stand and made those same statements himself, his decision to introduce his account of relevant facts indirectly through an expert witness should likewise be treated as a waiver obligating him to provide the same access to the State's expert that he has given to his own, and opening the door to the introduction of resulting State's evidence, as the State requests here, to the extent that he introduces comparable evidence on his own behalf. Just as the State may not use a compelled psychological examination to circumvent the privilege against self-incrimination, *see Estelle,* 451 U.S. at 463, 101 S.Ct. at

> 1873, neither may a defendant voluntarily employ a psychological witness wholly to negate the waiver that his direct introduction of personal testimony would otherwise effect.
> (*State v. Briand* (N.H.1988) 130 N.H. 650, 655-656, 547 A.2d 235.)

Permitting the prosecution access to the discovery generated by the court-ordered mental exams and/or permitting them to observe the exams would be like the prosecutor telling the defendant to testify at trial in the government's case-in-chief, what would constitute in Justice O'Connor's words "[t]he classic Fifth Amendment violation." (*South Dakota v. Neville* (1983) 459 U.S. 553, 563; see also *United States v. Housing Foundation of America, Inc.* (3rd Cir.1949) 176 F.2d 665, 666 ["Compelling the defendant Westfield to take the stand and to testify in a criminal prosecution against him is so fundamental an error...."; *DeLuna v. United States* (1962) 308 F.2d 140, 149, fn. 25 ["The right of a witness to give incriminating answers and the right of an accused not to take the stand must be distinguished, although both come within the protection of the Fifth Amendment."])

d. Fifth Amendment protects Maldonado's statements made during court-ordered exams from being subject to mandated reciprocal discovery obligations

Penal Code section 1054.3 requires criminal defendants to provide pretrial disclosure of their trial defense to the prosecution with one important exception: what defendant will say at trial ("other than the defendant"). Maldonado has complied.

The United States Constitution allows but does not require reciprocal discovery. (*Williams v. Florida* (1970) 399 U.S. 78 [Fifth Amendment not a bar to requiring defendant to provide notice and discovery of an alibi defense in a case where a state rule excepted defendant's testimony from the requirement].)

Both the Florida notice-of-alibi rule upheld in *Williams* and the California reciprocal discovery scheme approved by this Court in *Izazaga*

v. Superior Court (1991) 54 Cal.3d 356, contain exceptions from the rule for defendant statements. (*Williams* at 80; *Izazaga* at 364, fn. 1.)

Although the United States Supreme Court has not addressed this point directly (see *Wardius v. Oregon* (1973) 412 U.S. 470, 472, fn. 4), the Fifth Amendment requires this statutory exception (exempting defendant's statements and notice to be a witness in his own case from the requirements of accelerated pretrial discovery).

What renders the Fifth Amendment applicable to a defendant's compelled statements made during court-ordered mental health exams, is that all four requirements are met for the Fifth Amendment to apply. The statements must be incriminating; personal to the defendant; obtained by compulsion; and testimonial. Only when all four requirements are met does the Fifth Amendment apply. (*Izazaga*, at 366, citing *Doe v. United States* (1988) 487 U.S. 201, 207-208, 210-211 [testimonial]; *United States v. Nobles* (1975) 422 U.S. 225, 233 [personal]; *Schmerber v. California* (1966) 384 U.S. 757, 761 [compelled & testimonial]; *United States v. Hubbell, supra*, 530 U.S., at 34 ["The word 'witness' in the constitutional text limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character.]) "These four requirements emanate directly from the wording of the self-incrimination clause: 'No person ... shall be *compelled* in any criminal case to be a *witness against himself* ....' (Italics added.)" (*Izazaga*, at 366, fn. 4.) All four are met in this case:

(1) Incriminating

Chief Justice Marshall, presiding over the treason trial of former Vice President Aaron Burr, explained how a statement that appears innocuous, incriminates its author:

> According to their [prosecution] statement a witness can never refuse to answer any question unless that answer, unconnected

> with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.
> (*United States v. Burr* (C.C.Va.1807) 25 F.Cas. 38, 40.)

Marshall, C.J., decided that "[i]f such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction." (*Ibid.*)

The United States Supreme Court favorable cited the *Burr* decision as well as some corresponding state authority in finding such statements to fall within the protection of the Fifth Amendment. (*Counselman v. Hitchcock* (1892) 142 U.S. 547, 566, 574, overruled in part by *Kastigar v. United States* (1972) 406 U.S. 441 [privilege extends "to the disclosure of any fact which might constitute an essential link in a chain of evidence by which guilt might be established, although that fact alone would not indicate any crime."]; see also *Hoffman v. United States, supra*, 341 U.S., at 486 [covers "a link in the chain of evidence needed to prosecute"].)

Chief Justice Warren agreed: "No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate

himself in any manner; it does not distinguish degrees of incrimination." (*Miranda, supra*, at 476.)

Maldonado even answering a single question during the compelled mental exams may be construed and used by the prosecution to attempt to defeat Maldonado's defenses of suffering brain damage and neuro-cognitive deficits. The fact that he can walk and talk would be held against him.

Maldonado is in a similar position to drunk driving suspect Muniz who was asked "if he knew the date of his sixth birthday:"

> Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful). The content of his truthful answer supported an inference that his mental faculties were impaired, because his assertion (he did not know the date of his sixth birthday) was different from the assertion (he knew the date was (correct date)) that the trier of fact might reasonably have expected a lucid person to provide. Hence, the incriminating inference of impaired mental faculties stemmed, not just from the fact that Muniz slurred his response, but also from a testimonial aspect of that response. (*Pennsylvania v. Muniz, supra*, at 599.)

"Compelled testimony that communicates information that may lead to incriminating evidence is privileged even if the information itself is not inculpatory." (*United States v. Hubbell, supra*, 530 U.S., at 38.)

What emerges is that anything that Maldonado says during the compelled exams is incriminating. "It is clear that the accused in a criminal case is exempt from giving answers altogether, for (at least on the prosecutor's assumption) they will disclose incriminating information that the suspect harbors." (*Doe v. United States, supra*, 487 U.S., at 214, fn. 12.)

(2) Personal

Maldonado's statements to any examiner are obviously personal.

(3) Compelled

When the trial court orders a defendant to submit to a mental health exam at the behest of the prosecution to provide them with rebuttal evidence, the exam is obviously compelled. It is to be noted that this case does not involve an insanity defense, which presents a different situation. This Court has stated that "[t]he appointment of a psychiatrist pursuant to [Penal Code] sections 1026 and 1027 is made only in response to the defendant's entry of a plea of not guilty by reason of insanity. The examination, initiated at the behest of the defendant, is not 'compelled.'" (*People v. Williams* (1988) 44 Cal.3d 883, 961.) Any insanity cases cited by the prosecution, e.g. *United States v. Stockwell* (2nd Cir.1984) 743 F.2d 123, and *State v. Martin* (Tn.1997) 950 S.W.2d 20, do not inform this Court about the pending dispute.

(4) Testimonial

The statements Maldonado "would make in a court-ordered mental examination would unquestionably be testimonial." (*Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1112.) "His comments to the People's expert would necessarily reveal what the United States Supreme Court termed the 'contents' and 'operations' of his mind." (*Ibid.*, citing *Doe v. United States, supra*, 487 U.S., at 211.) "A psychiatric examination ... requires a defendant to communicate, to provide his opinions and ideas, to describe his perceptions, to reveal the contents of his mind; in short, to serve as a witness against himself." (*Verdin*, at 1112-1113.) "[I]n *Estelle v. Smith* ... we held that a defendant's answers to questions during a psychiatric examination were testimonial in nature." (*Pennsylvania v. Muniz, supra* 496 U.S., at 599, fn. 13.)

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e. Complying with reciprocal discovery obligations regarding non-compelled defendant statements does not constitute a voluntary and intelligent waiver of a constitutional right

Maldonado has complied with his reciprocal discovery obligations. Such does not constitute a waiver of his Fifth Amendment right for two reasons. First, Maldonado complied because he is required to do so by state law. His compliance could never constitute a voluntary, knowing, and intelligent waiver. (See *Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

Second, it requires him "to forfeit one constitutionally protected right as the price for exercising another," i.e. the Sixth Amendment right to present evidence. (See *Lefkowitz v. Cunningham* (1977) 431 U.S. 801, 807-808 [involving First and Fifth Amendments], citing *Simmons v. United States* (1968) 390 U.S. 377, 394 [involving Fourth and Fifth Amendments].)

A waiver secured under threat of substantial sanction (i.e., not being able to present the mental health defense experts for failure to submit to the compelled examinations) cannot be termed voluntary. (See *Lefkowitz v. Turley* (1973) 414 U.S. 70, 82-83 [economic sanction].)

Also, a state rule requiring a criminal defendant who desires to testify, to do so before any other defense testimony is heard, was held to violate the Fifth Amendment. (*Brooks v. Tennessee* (1971) 406 U.S. 605.) Such rule "is an impermissible restriction on the defendant's right against self-incrimination." (*Id.*, at 609.)

Brooks stands for the proposition that no one other than a defendant may choose when he actually waives the privilege. Accelerated disclosure of the compelled mental health exams discovery removes that choice from defendant, a practice *Brooks* does not permit.

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f. Court of Appeal mistakenly treats compelled exam statements like other reciprocal discovery

As demonstrated, *Williams* and *Izazaga* are limited in their reach to accelerated disclosure of discovery that was not compelled from a defendant's mind or lips. The Court of Appeal's quotation from *Williams* must be read with that limitation in mind:

> ... he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination. (*Williams, supra*, 399 U.S., pp. 83-84; quoted in Court of Appeal opn. at 20.)

In quoting *Williams*, the Court of Appeal found that "[t]his reasoning, of course, applies equally to a defendant who is compelled to undergo a prosecution psychiatric examination once he chooses to present psychiatric evidence of his own on his mental condition at trial. Maldonado has given notice of his intent to do so." (Court of Appeal opn. at 20.)

Yet, the Court of Appeal did not include the first five words of that passage: "When he presents his witnesses ...." (*Williams, supra*, 399 U.S., p. 83.) These words signify that the *Williams* passage refers to discovery from defense witnesses other than the defendant. The distinction makes a difference: compelled defendant statements enjoy Fifth Amendment protection. The Court of Appeal erred in extending the *Williams* reasoning - promulgated in light of the defendant exception embedded in Florida's notice-of-alibi rule - to situations involving compelled defendant statements, thoughts and beliefs.

The Court of Appeal's error is borne out by a passage in *Izazaga* that analyzes accelerated disclosure vis-à-vis the Fifth Amendment:

> The timing of the disclosure, whether before or during trial, does not affect any of the four requirements that together trigger the privilege against self-incrimination, and therefore cannot implicate the privilege. The acceleration doctrine of *Williams, supra*, 399 U.S. 78, compels this conclusion. We conclude that the statements of the witnesses that the defense intends to call at trial are not *personal to the defendant*, and therefore compelled discovery of such statements does not implicate the self-incrimination clause.
> (*Izazaga, supra*, 54 Cal.3d, at 368-369; footnote omitted.)

Accelerated disclosure is proper for any defense discovery that does not meet all four requirements. Maldonado's statements to Drs. Kline, Perez, and Cassini were not compelled, hence, reciprocal discovery was proper as to those statements. But the Fifth Amendment blocks accelerated disclosure of the mental health evaluations compelled by the court, because those statements meet all four requirements.

The statutory discovery framework recognizes this constitutional block: the defendant is not "required to disclose any materials or information which ... are privileged as provided by the Constitution of the United States." (Penal Code § 1054.6.)

What ends this blockage is a defendant's waiver of the privilege, which does not occur until after the prosecution completes its case-in-chief and then only if and when the defendant offers mental health evidence at trial.

2. Immunity bars any trial use of compelled exam evidence

The government's power to compel testimony is firmly established in Anglo-American jurisprudence. (*Kastigar v. United States, supra*, at 443.) "But the power to compel testimony is not absolute." The most important exemption is the Fifth Amendment privilege against self-incrimination. (*Id.*, at 444.)

The United States Supreme Court weighed under what circumstances a person who asserts the privilege may be compelled to speak:

> The statute's explicit prescription of the use in any criminal case of 'testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)' is consonant with Fifth Amendment standards. 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.... It prohibits the prosecutorial authorities from using the compelled testimony in any respect.
> (*Id.*, at 453.)

The Court recently cited *Kastigar* with approval: "...even though immunity is not itself a right secured by the text of the Self-Incrimination Clause, but rather a prophylactic rule we have constructed to protect the Fifth Amendment's right from invasion." (*Chavez v. Martinez* (2003) 538 U.S. 760, 769, fn. 2 (plurality opn. of Thomas, J.).)

Kastigar assures that no use may be made of any of petitioner's statements in return for compelling him to speak to the mental health experts pursuant to court order.

The prosecution and the Court of Appeals dissenter suggest that derivative use immunity - without use immunity - suffices to compel petitioner to undergo the pretrial exam.[6] This violates *Kastigar*, which requires that both use and derivative use immunity be afforded to a defendant before he may be compelled to partake in the pretrial mental

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[6] "[P]reparing its case for trial" has been deemed to constitute "derivative use," and would therefore be impermissible even under the prosecution's limited immunity theory. (See *United States v. Hubbell, supra*, 530 U.S., at 41.) Also, this Court has recognized that if the defense does not call its mental health expert to testify, the prosecution would receive "an unwarranted windfall." (*People v. Wash* (1994) 6 Cal.4th 215, 252.)

health exams. This outcome would not benefit the prosecution as *Kastigar* would prevent any use - including for rebuttal purposes - of anything Maldonado tells the examiners.

Compliance with *Kastigar* defeats the purpose of having the exams conducted as their fruits could never be used against Maldonado. This would have the same effect as the immunity provided within the context of competency exams. (See *People v. Pokovich* (2006) 39 Cal.4th 1240.)[7] Therefore, the immunity route does not accomplish the aim of providing the prosecution with rebuttal evidence (a legitimate aim) while protecting petitioner's Fifth Amendment right (a legitimate aim of constitutional import). Providing the required *Kastigar* immunity obviates the need to conduct the exams.

The only permissible way around the immunity bar is for the prosecution to be shielded from observing the compelled exams and from any discovery generated by them, until Maldonado waives his Fifth Amendment right by presenting mental health evidence at trial (or as Maldonado has proposed after the close of the prosecution case-in-chief but only if the defense confirms its intent to present mental health evidence.)

B. Maldonado is exercising his Fifth Amendment right directly and is not seeking redress for transgressions of prophylactic measures

Maldonado is exercising his Fifth Amendment right in not wanting to submit to compelled mental health examinations. He will, of course, submit if his Fifth Amendment is protected by shielding the prosecution from observing the exams and obtaining discovery materials about the exams. Maldonado is focused on asserting his Fifth Amendment guarantee. The prosecution is focused on violating Maldonado's right first, and then discussing how to remedy the violation, relying on *Chavez v. Martinez*.

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[7] Competency is not an issue before this Court.

Martinez was questioned by police without having been given the familiar warnings under *Miranda, supra*, 384 U.S. 436. (*Chavez v. Martinez* (2003) 538 U.S. 760, at 764.) Although Martinez was never charged criminally, and his answers were never used against him in any criminal prosecution, Martinez filed a civil rights suit against the police officer who had questioned him. (*Ibid.*) The Supreme Court held the failure to advise Martinez of his *Miranda* rights did not rise to a Fifth Amendment violation because a trial was never held, and therefore, a claim was not actionable under the federal civil rights statutes. (*Id.*, at 772, Thomas, J., [plurality opn.])

While describing the Fifth Amendment privilege as a trial right that is not violated until use is made of prohibited statements against a criminal defendant at trial, the *Chavez* plurality acknowledged that the Fifth Amendment allows one to remain silent when questioned prior to trial. (*Id.*, at 770 (plurality opn. of Thomas, J.) ["*Lefkowitz v. Turley* [(1973) 414 U.S. 70], at 77(stating that the Fifth Amendment privilege allows one 'not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings'), that does not alter our conclusion that a violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case."])

The *Chavez* plurality noted that "the Fifth Amendment privilege may be asserted if one is 'compelled to produce evidence which later *may* be used against him as an accused in a criminal action.'" (*Chavez, supra*, 538 U.S., at 771, citing *Maness v. Meyers* (1975) 419 U.S. 449, 461-462.)

The prosecution fails to take note of the distinction between there not being a civil remedy for the failure to warn pursuant to *Miranda*, which constitutes a prophylactic measure to safeguard the Fifth Amendment (the

Chavez case) and a defendant's right to exercise his Fifth Amendment guarantee (this case). *Chavez* does not involve the Fifth Amendment directly. Maldonado's exercise of the right does.

This case is not, as Justice Scalia would say, about a story of prophylaxis built upon other stories of prophylaxis. (*Montejo v. Louisiana* (2009) 556 U.S. ___, 129 S.Ct. 2079, 2092.) Indeed, the Court has "recognized that these procedural safeguards [*Miranda* warnings] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." (*Michigan v. Tucker* (1974) 417 U.S. 433, 444.)

"Our precedents insist that judicially created prophylactic rules like those in ... *Miranda* ... maintain 'the closest possible fit' between the rule and the Fifth Amendment interest they seek to protect." (*Maryland v. Shatzer* (2010) 559 U.S. ___, 130 S.Ct. 1213, 1227 [Thomas, J., concurring in part and concurring in the judgment].) But Maldonado seeks the protection of the Fifth Amendment itself, not some prophylactic rule judicially crafted to safeguard the right. The Clause itself is not subject to a cost-benefit analysis, as is the case for prophylactic measures. (See *Maryland v. Shatzer, supra*, 130 S.Ct., at 1220.)

What Justice Scalia wrote in a Sixth Amendment context is apt in this situation: "The Court today has applied 'interest-balancing' analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings." (*Maryland v. Craig, supra*, 497 U.S., at 870 [Scalia, J., dissenting opn.])[8]

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[8] An example of the use of prohibited interest-balancing to defeat a disclosure protection is a case relied upon by the prosecution: "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

Maldonado is not complaining about any prophylactic rule not having been followed, for instance that he was not read his rights. Instead, Maldonado complains that he is not allowed to exercise his Fifth Amendment right, which is why he seeks the Court's protection. Justice Mosk wrote: "Compulsion directly violates the privilege." (*People v. Hardy* (1992) 2 Cal.4th 86, 216 [Mosk, J., concurring].)

Employing an exclusionary rule at trial suffices to remedy a violation of a prophylactic measure such as the *Miranda* warnings. But "the existence of an exclusionary rule will not easily justify a compelled examination in the first place. Exclusion is a remedy for a constitutional violation; the defendant should not be precluded from preventing the constitutional violation from occurring." (*United States v. Davis* (6th Cir.1996) 93 F.3d 1286, 1295, fn. 8.)

The prosecution seeks to have a rule of convenience imposed. But this would be akin to the prosecution interviewing a defendant prior to trial so as to prepare itself for rebuttal in the event that the defendant testifies. The Constitution sanctions neither procedure. As one New York court said: "Because the very nature of the right against self incrimination (i.e. preventing compelled self incrimination), governmental necessity for evidence cannot override the Fifth Amendment. The necessity for obtaining evidence is not a basis for abdicating a defendant's right against compelled self incrimination." (*People v. Diaz, supra*, 777 N.Y.S.2d, at 863.)

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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 25 [insanity case] - cited by prosecution in Opening Brief at 17, 23.) Unlike Maldonado, the defendant in *Martin* requested the court to "balance the 'competing interests at stake.'" (*State v. Martin, supra*, at 23.)

Said the highest court in Massachusetts: "Nor is the notice of such a defense a basis of holding that he must voluntarily surrender the protections of the privilege for reasons of expediency, fairness or reciprocity. While such concepts may apply to areas where the privilege has no application, e.g., alibi defenses, they have no valid application to an area protected by the privilege." (*Blaisdell v. Commonwealth, supra*, 372 Mass., at 764.)

Last but not least, our nation's highest court has "already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need." (*Lefkowitz v. Cunningham, supra*, 431 U.S., at 808.)

C. Sixth Amendment right to counsel requires that prosecution be shielded from compelled exams until Fifth Amendment is waived

The Court of Appeal held that the Sixth Amendment issues raised by Maldonado "appear moot and/or unmeritorious." (Court of Appeal opn. at 6.) Maldonado maintains that his Sixth Amendment rights are implicated, as recognized by *Estelle v. Smith, supra*, 451 U.S. 454, and *In re Spencer* (1965) 63 Cal.2d 400. (See also *Satterwhite v. Texas* (1988) 486 U.S. 249, and *Powell v. Texas* (1989) 492 U.S. 680.)

Unless the prosecution is precluded from observing the compelled mental exams and their product, the prosecution will be privy to what defendant and counsel will need to review in order to decide whether to tender the mental health defense at all in light of the government exam results. It would allow the prosecution into the minds of defendant and his counsel, and have a virtual seat at the table as defendant and counsel confer about the defense options. Such privy violates the Sixth Amendment.

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D. Maldonado case presents an open question

1. United States Supreme Court has not addressed the issue

In *Estelle v. Smith*, the Court "held that a capital defendant's Fifth Amendment right against compelled self-incrimination precludes the state from subjecting him to a psychiatric examination concerning future dangerousness without first informing him that he has a right to remain silent and that anything he says can be used against him at a sentencing proceeding." (*Powell v. Texas* (1989) 492 U.S. 680, 681.)

In *Estelle v. Smith*, the trial court - without a defense request - had appointed a psychiatrist to examine the defendant's competency prior to trial. Going beyond his assignment, the psychiatrist ended up testifying as a prosecution witness at the penalty phase, concluding that defendant would constitute a danger in the future. The psychiatrist's conclusion was based on his discussions with the defendant, whom the psychiatrist had not counseled with the *Miranda* warnings. Defendant was sentenced to death. (*Id.*, at 456-457, 459-460, 464, fn. 9.)

The Court held that the admission of the psychiatrist's testimony at the penalty phase violated the defendant's Fifth Amendment privilege because the defendant was not advised prior to the pretrial mental health examination that he had a right to remain silent and that any statement he made could be used against him at the penalty phase. Chief Justice Burger wrote for the Court that

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness.
> (*Id.*, at 468.)

The Court in *Estelle v. Smith* acknowledged that "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase," while referring to its footnote 10:

> On the same theory, the Court of Appeals here carefully left open "the possibility that a defendant who wishes to use psychiatric evidence in his own behalf [on the issue of future dangerousness] can be precluded from using it unless he is [also] willing to be examined by a psychiatrist nominated by the state." 602 F.2d, at 705.
> (*Estelle v. Smith, supra*, 451 U.S., at 466, fn. 10 and 472.)

This case presents the open issue: Maldonado intends to present mental health evidence to the jury as part of his defense in this non-capital case. At what point then, does Maldonado actually waive his Fifth Amendment right, to what extent, and what is the legal effect of the precise timing of the waiver on the timing of when disclosures should be made to the prosecution regarding mental health exams to be conducted by prosecution-selected experts in order to help the prosecution rebut the defense?

Subsequent to *Estelle v. Smith*, the United States Supreme Court has twice visited upon Fifth Amendment issues in the mental health context but in limited fashion. Our nation's highest court has not yet answered the precise questions raised by Maldonado.

The issue in *Buchanan v. Kentucky* (1987) 483 U.S. 402, was "whether the admission of findings from a psychiatric examination of petitioner proffered solely to rebut other psychological evidence presented by petitioner violated his Fifth and Sixth Amendment rights where his counsel had requested the examination and where petitioner attempted to establish at trial a mental-status defense." (*Id.*, at 404.) The findings that were admitted excluded any references to petitioner's competency to stand trial (*id.*, at 412) and "'contained no inculpatory statements by [petitioner] or any accusatory observation by the examiner who merely recited his

observations of [petitioner's] outward appearance.'" (*Id.*, at 414; quoting the Kentucky Supreme Court).

The distinct specifics of *Buchanan* led to the U.S. Supreme Court's limited holding:

> ... if 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 422-423.)

The *Buchanan* Court further stated that neither the Fifth nor Sixth Amendments were implicated because defense counsel joined in the request for the court-ordered evaluation, the psychiatrist testifying for the prosecution did not describe the defendant's statements made to the psychiatrist, and the defendant did not take the witness stand. (*Id.*, at 423.)

More recently, the Court in *Penry v. Johnson* (2001) 532 U.S. 782, 786, considered "whether the admission into evidence of statements from a psychiatric report based on an uncounseled interview with Penry ran afoul of the Fifth Amendment." At the penalty phase of Penry's capital jury trial, defendant Penry presented testimony from a clinical neuropsychologist who testified that "Penry suffered from organic brain impairment and mental retardation." On cross-examination, the prosecutor asked the expert to read from a mental competency report prepared at the request of defendant Penry in an unrelated rape case that predated the capital murder. Over objection, the neuropsychologist, who had reviewed the earlier report in preparing his testimony, read the portion of the earlier mental competency report stating that it was the competency evaluator's "'professional opinion that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons.'" (*Id.* at 788.)

Penry argued that admission into evidence of the earlier report violated Penry's "Fifth Amendment privilege against self-incrimination because he was never warned that the statements he made ..." might later be used against him. (*Id.*, at 793.)

The *Penry* court did not find a violation but its decision is premised on two critical distinctions with the case at bench: Penry's own counsel requested the earlier competency report (Maldonado objects to any examinations by any court-appointed experts); and, the *Penry* case involved the cross-examination of Penry's own expert with the contents of a report the expert had reviewed in preparation for his testimony. (*Id.*, at 794.) The *Penry* case does not answer the open question. Like *Buchanan*, *Penry* addressed the propriety of the prosecution using psychiatric reports to rebut a defendant's mental health evidence. Maldonado takes no exception to having his experts cross-examined with either their own reports (*Buchanan*) or prior psychiatric reports (*Penry*).

2. Paucity of authority explained

Justice Scalia recently commented that "[i]t should be unsurprising that such a significant matter has been for so long judicially unresolved." (*District of Columbia v. Heller* (2008) 554 U.S. ___, 128 S.Ct. 2783, 2816 [referring to the Second Amendment right to bear arms].) "Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods." (*Ibid.*) Several reasons explain this dearth of on-point authority, including in California.

a. Fifth Amendment did not become applicable against the states until 1964

The Fifth Amendment was ratified on December 15, 1791, as one of the first ten amendments known as the "Bill of Rights." The Bill of Rights, including the Fifth Amendment, originally applied only to the Federal

Government. (*Barron ex rel. Tiernan v. Mayor of Baltimore* (1833) 32 U.S. 243.)

But "[t]he constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system." (*McDonald v. City of Chicago, Ill.* (2010) 561 U.S. ___, 130 S.Ct. 3020, 3028.) The provision at issue relevant to this case, § 1 of the Fourteenth Amendment, provides, among other things, that a State may not abridge "the privileges or immunities of citizens of the United States" or deprive "any person of life, liberty, or property, without due process of law." The Fourteenth Amendment was ratified on July 9, 1868.

Four years after the adoption of the Fourteenth Amendment, the United States Supreme Court was asked to interpret the Amendment's reference to "the privileges or immunities of citizens of the United States." (See *Slaughter-House Cases* (1873) 83 U.S. 36.) Justice Samuel Miller's opinion for the Court limited the protection of the Privileges or Immunities Clause to those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." (*Id.*, at 79.) Under the Court's narrow reading, the Privileges or Immunities Clause protects such things as the right "to come to the seat of government to assert any claim [a citizen] may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions ... [and to] become a citizen of any State of the Union by a bonafide residence therein, with the same rights as other citizens of that State." (*McDonald, supra*, 130 S.Ct., at 3029, citing *Slaughter-House, supra*, 83 U.S., at 79-80, internal quotation marks omitted).

Four Justices dissented. Justice Field, joined by Chief Justice Chase and Justices Swayne and Bradley, criticized the majority for reducing the Fourteenth Amendment's Privileges or Immunities Clause to "a vain and

idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." *(Id.*, at 96.) Justice Bradley's dissent observed that "we are not bound to resort to implication ... to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself." (*Id.*, at 118.) Justice Bradley would have construed the Privileges or Immunities Clause to include those rights enumerated in the Constitution as well as some unenumerated rights. (*Id.*, at 119.)

The Court - with the exception of Justice Thomas - has seen no need to reconsider the *Slaughter-House* interpretation. (*McDonald, supra*, 130 S.Ct., at 3030 [plurality opinion], 3089 [Stevens, J. dissenting], and 3058 [Thomas, J., concurring].) Instead, for many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. (*Id.*, at 3030-3031 [plurality opinion] and 3089 [Stevens, J., concurring].)

In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights. (*Id.*, at 3031.) But the Court during this era was not hesitant to hold that a right set out in the Bill of Rights failed to meet the test for inclusion within the protection of the Due Process Clause. The Court found that the Fifth Amendment privilege against self-incrimination qualified as such a right. (*Id.,* at 3032, citing *Twining v. New Jersey* (1908) 211 U.S. 78, 99.) The *Twining* Court found that due process did not provide a right against compelled incrimination in part because this right "has no place in the jurisprudence of civilized and free countries outside the domain of the common law." (*Id.*, at 113.)

Later, the Court initiated a process of "selective incorporation," i.e., the Court began to hold that the Due Process Clause fully incorporates

particular rights contained in the first eight Amendments. (*McDonald, supra*, 130 S.Ct., at 3034.) "The Court eventually incorporated almost all of the provisions of the Bill of Rights. Only a handful of the Bill of Rights protections remain unincorporated." (*Id.*, at 3034-3035.)

The Court incorporated the Fifth Amendment privilege against self-incrimination as applicable to the States in *Malloy v. Hogan, supra*, 378 U.S., at 5-6.) The same Court abandoned any "notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," stating that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." Instead, the Court decisively held that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." (*McDonald, supra*, 130 S.Ct., at 3035, citing *Malloy*, 378 U.S., at 10-11; internal quotation marks omitted.)[9]

In employing the selective incorporation doctrine, the *Malloy* Court overruled its earlier decisions in which it had held that the Fifth Amendment privilege did not apply to the States. (*McDonald, supra*, 130 S.Ct., at 3036, citing *Malloy*'s overruling of *Adamson v. California* (1947) 332 U.S. 46, and *Twining, supra*, 211 U.S. 78.)

b. Lack of appellate criminal jurisdiction in the early federal courts

The United States Supreme Court did not delve into the Fifth Amendment right against self-incrimination until its decision in *Boyd v. United States* (1886) 116 U.S. 616, nearly a century after the amendment's

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[9] The one exception to this general rule - the requirement for jury unanimity - is not relevant to this discussion. (See *McDonald v. City of Chicago, Ill., supra*, 130 S.Ct., at 3035, fn. 14.)

ratification. (Alan G. Gless, Self-Incrimination Privilege Development in the Nineteenth-Century Federal Courts: Questions of Procedure, Privilege, Production, Immunity and Compulsion, 45 Am. J. Legal History 391, 393, 439 (2001) [hereinafter Gless].) "The reason was simple. The Court almost completely lacked any appellate jurisdiction over federal criminal cases" during that time. (*Id.*, at 393.) The Court had possessed, however, various degrees of appellate habeas jurisdiction over federal circuit cases. (3 C. Warren, The Supreme Court in United States History 187 (1922) [hereinafter Warren].)

Congress did not enact its first Supreme Court criminal appellate review statute until 1874 (specified Utah Territory cases only) and did not provide for such review in capital cases until 1889; and finally to all federal criminal defendants convicted of "infamous crimes" until 1891. (Gless, supra at 394; see also 3 Warren, supra at 54, n. 1.)

c. Historically small number of federal crimes

Although there are now an estimated 3,600-plus federal crimes, at the time the United States Constitution was ratified, Congress had explicit powers to render criminal only counterfeiting, piracies and felonies committed on the high seas, offenses against the law of nations, and treason; and could exercise exclusive legislation over the District of Columbia and federal enclaves. (U.S. Const., art. I, § 8 & art. III, § 3; see Susan A. Ehrlich, The Increasing Federalization of Crime, 32 Ariz. St. L.J. 825, 826-827 (2000) [hereinafter Ehrlich].) Federal criminal common law has never existed. (*United States v. Hudson* (1812) 11 U.S. 32, 32-33.)

"The first Congress added other conduct of a limited yet federal nature, such as the obstruction of justice in the federal courts." (Ehrlich, at 827.) "[U]ntil the Civil War, there were only a few federal crimes, and those still restricted largely to offenses against the United States, its officers and property, and its enclaves of jurisdiction, and there was virtually no

overlap between federal and state offenses." (Id., at 830.) "Prohibition and the Depression spawned an increasing number of new federal offenses, including, for the first time, crimes of violence against individuals and businesses, as well as the first federal firearms legislation." (Id., at 833.) In the 1960s and 1970s, Congress used the interstate commerce power to penalize drug offenses and organized crime as well as to regulate narcotics. (Id., at 834.)

"[O]f the federal criminal statutes enacted since the Civil War, approximately 40 percent have been passed since 1970." (Id., at 826.) Prior to the applicability of the Fifth Amendment to the states in 1964, the small number of federal crimes - compared to the number of state crimes - in part explains the lack of development of much Fifth Amendment jurisprudence. (See Gless, at 402-403.)

d. Defendants could not testify until 1878

Criminal defendants were disqualified from testifying in federal court until 1878. (*Ferguson v. Georgia* (1961) 365 U.S. 570, 577.) California had removed the disability in 1866. (*Ibid.*, fn. 6.) The testimonial disqualification of criminal defendants contributed to the dearth of Fifth Amendment jurisprudence. (Gless, at 403.)

Unsurprisingly, the scant, early self-incrimination authority involved the privilege claims of witnesses. (See *United States v. Gooseley* (C.C.Va. undated)[10] 25 F.Cas. 1363 ["The court said he was not bound to tell anything that might 'tend to criminate himself.']; and *United States v. Burr, supra*, 25 F.Cas., at 40 (Marshall, C.J., sitting as a Circuit Court Judge, wrote: "If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact."].)

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[10] The *Gooseley* opinion was written by Supreme Court Justice Iredell sitting as a Circuit Court Judge. He died on October 2, 1999. (1 Warren 156.) The opinion must therefore date to the 1790s. (Gless, at 402, n. 41.)

e. No California authority on point

The issue of the legal effect of the actual timing of the Fifth Amendment waiver on the disclosure obligations of a criminal defendant with respect to discovery generated by prosecution-compelled mental health exams has not been addressed by any California court.

Long before *Estelle v. Smith*, this Court held that a court-appointed psychiatrist's testimony was admissible on the guilt issue in a case where the defendant had first entered an insanity plea, then been examined by the psychiatrist, then had withdrawn the plea. (*In re Spencer, supra*, 63 Cal.2d, at 404, 408.)

In rejecting a Fifth Amendment challenge, the Court commented that: "Yet to our knowledge no federal case has held that the introduction at the guilt phase of the trial of a defendant's statements to a court-appointed alienist violates his constitutional right against self-incrimination". (*Id.*, at 409.) One appellate court noted that "[i]n light of *Estelle v. Smith* ... it is questionable whether these holdings survive *Miranda v. Arizona*." (*People v. Williams* (1988) 197 Cal.App.3d 1320, 1323, fn. 5.)

Four years later, one Court of Appeal considered whether the prosecution was entitled to seek pretrial mental health examinations when a defendant raised a diminished capacity issue for purpose of showing that the defendant lacked the capacity to make a knowing and intelligent waiver of his constitutional rights at the time he was interrogated by police. (*McGuire v. Superior Court* (1969) 274 Cal.App.2d 583, 587-588.) The appellate court pointed out, though, that the trial court did not order McGuire to submit to any psychiatric examination: "The petitioner was not required to submit to the examination. He was merely required to make arrangements for an appointment and to call each doctor no later than November 4, 1968." (*Id.*, at 597-598.) McGuire was allowed to refuse the

examinations, and his refusal was scrupulously honored as an exercise of his constitutional privilege against self-incrimination. (*Ibid.*)

Four years hence, another Court of Appeal approved of a trial court's order granting the prosecution permission to have a defendant examined in order to provide the prosecution with rebuttal evidence. (*People v. Danis* (1973) 31 Cal.App.3d 782, 785.) *Danis* does not inform us on the present questions because the prosecution in *Danis* moved for the psychiatric appointment after the defense psychiatrist had testified at trial. (*Id.*, at 784-785.)

The same factual circumstance presented itself before this Court in two capital appeals. In the penalty phase of the first case, the "prosecutor requested that a prosecution psychiatrist be permitted to examine defendant before testifying in rebuttal." Two defense psychiatrists had already testified as to the defendant's mental condition. The trial court had granted the prosecution's request. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1190.) In the second case, also in the penalty phase, "[a]fter the defense presented expert testimony about defendant's mental condition, the prosecution moved to compel defendant to submit to a psychiatric examination. Over defense objection, the court granted the motion." (*People v. Carpenter* (1997) 15 Cal.4th 312, 412.) Like *Danis*, *McPeters* and *Carpenter* are inapposite as the prosecution mental health exam requests came after the defendant's mental health evidence had been introduced into evidence at trial.

Recently, this Court held that court-ordered mental examinations of defendants by prosecution experts must have a statutory basis. (*Verdin v. Superior Court, supra*, 43 Cal.4th, at 1106 [concluding that *Danis* and *McPeters* did not survive the passage of Proposition 115].) The Court specifically did not reach any constitutional issues. (*Id.*, at 1102, 1116.)

No California cases address the timing of any disclosures to the prosecution of the results of any mental health examinations compelled by the court in light of a defendant's Fifth Amendment right to remain silent.

f. Foreign jurisdiction cases are not helpful

(1) Federal cases cited by the prosecution

The prosecution cites several federal cases in opposition to the Fifth Amendment. (Opening Brief at 14-16, 22-23.)

One federal capital defendant opposed the government's conduct of a pretrial mental health exam and requested "the sealing of the results of the examination until the penalty phase of his trial." (*United States v. Hall, supra*, 152 F.3d, at 399.) The *Hall* court acknowledged the benefits thereof but concluded "that such a rule is not constitutionally mandated." (*Ibid.*, at 399.)

The *Hall* conclusion is outdated and wrong. Outdated because what the defendant in *Hall* requested is now the law. The 2002 amendments to rule 12.2 of the Federal Rules of Criminal Procedure require the sealing of examination results in capital cases until after a verdict of guilt has been rendered and the defendant has reaffirmed his intention to introduce mental health evidence at the penalty phase. Wrong because *Hall* never analyzed the waiver/timing issue.

Another case cited involved mental health examination results that were shared only with a "taint" assistant prosecutor who could not divulge the examination results and details to the prosecution team trying the guilt phase of a capital case until after the completion of the guilt phase. (*United States v. Allen* (8th Cir.2001) 247 F.3d 741, 773-774, cert. granted and case remanded on other grounds, 536 U.S. 953.) The measure adopted in *Allen*

is in the nature of the protective measures sought by Maldonado and what is provided by rule 12.2.[11]

Then Circuit Judge Scalia authored the plurality opinion in *Byers* (joined by then Circuit Judge Ginsburg), an insanity case that did not involve an issue of precluding disclosure until the Fifth Amendment is actually waived. (*United States v. Byers* (D.C.Cir.1984) 740 F.2d 1104.) The case centered on the admission of a government psychiatrist's testimony relating unrecorded statements of the defendant during a court-ordered examination. (*Id.*, at 1106, 1115.) But in the trial court Byers had never objected to the evidence on constitutional grounds. (*Id.*, at 1123-1126 [Robinson, C.J., concurring in judgment].)

Unmentioned in the prosecution brief is an appellate court's approval of a trial court's securing of a defendant's Fifth Amendment right against self-incrimination by ordering the examiner not to disclose the contents of statements or conversations of the defendant until further order of the court. The federal appellate court held that this protective measure helped neutralized constitutional concerns. (*Presnell v. Zant* (11th Cir.1992) 959 F.2d 1524, 1533-1534.)

(2) State cases and rules cited by prosecution

The prosecution cites various out-of-state cases and rules in opposition to the Fifth Amendment. (Opening Brief at 16-17, 23-25, and 38.)

Arizona rejected a requirement that disclosure of prosecution-requested mental health exams relating to the penalty phase of a capital case be withheld until after a guilty verdict had been rendered. (*Phillips v.*

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[11] A recent capital case addresses very interesting issues relating to the mixing of defense mental health evidence for purposes of the guilt and sentencing phases of trial but does not reach the constitutional issues presented within. (*United States v. Williams* (D.Hawai'i 2010) ___ F.Supp.2d ___, 2010 WL 3230081.)

Araneta (Ariz.2004) 208 Ariz. 280, 93 P.3d 480.) But the Arizona defendant did not base his delayed disclosure request on constitutional grounds - even though he invoked the Fifth Amendment on a different claim (that he had an absolute right to refuse such exam); instead, he cited a concern for potential prosecutorial misuse of the exam information. (*Id.*, at 282-283.) An earlier case held that a defendant's submission to a court-ordered examination did not violate the constitutional right but did not take up the waiver timing issue. (*State v. Schackert* (Ariz.1993) 175 Ariz. 494, 500, 693 P.2d 969.)

The Florida rule (Fla. R. Crim. P. Rule 3.216, subds. (e) & (f)) permitting the prosecutor to be present during the mental health exam of a defendant was added at the prodding of that state's top court in *State v. Hickson* (Fla.1993) 630 S.2d 172, 176, fn. 10, which case did not consider the effect of the timing of a Fifth Amendment waiver on the presence of prosecution counsel and the timing of discovery disclosure.

The Georgia decision cited contains one line - devoid of any analysis - on the topic of conducting pretrial exams but is silent on the issue of when to disclose. (*Sears v. State* (Ga.1993) 262 Ga. 805, 807, 426 S.E.2d 553.) Not cited by the prosecution is a later case by the same court endorsing "the trial court's decision to seal the report of the examination of Johnson by the State's expert until the conclusion of the guilt/innocence phase of Johnson's trial and an announcement by the defendant that he intends to present expert mental health testimony during the sentencing phase." (*State v. Johnson* (Ga.2003) 276 Ga. 78, 81, 576 S.E.2d 831.) The cited Georgia rule requiring defense counsel to provide the prosecutor with exam reports applies only to insanity cases. (Uniform Superior Court Rule 31.5)

The Kentucky case also involved an insanity plea - an issue distinct from the one within. (*Cain v. Abramson* (Ky.2007) 220 S.W.3d 276, 277.) The defendant, who had been ordered to submit to a prosecution-requested

psychiatric exam, sought to have his counsel present during the exam. He did not request disclosure limits. (*Id.*, at 277-282.)

The Minnesota rule permitting the prosecution access to exam reports has not been tested in the courts on the issue of the effect of the timing of the Fifth Amendment waiver on the disclosure timing. (See Minn. Rules Crim. Proc., rule 20.02, subd. (4).)

The Mississippi case stands for the proposition that reciprocal discovery obligations with respect to defense mental health evidence do not present a Fifth Amendment issue. No prosecution-requested exams were conducted. (*Byrom v. State* (Miss.2004) 863 So.2d 836, 847-848.) The *Byrom* issue is similar to reciprocal discovery issues litigated in *Woods v. Superior Court* (1994) 25 Cal.App.4th 178, and *People v. Jones* (2003) 29 Cal.4th 1229, 1263-1264. (See Opening Brief at 25-26.) Maldonado has complied with his reciprocal discovery obligations which are not at issue before this Court.

The New Hampshire Supreme Court provided a thoughtful analysis of compelling a defendant to submit to a court-ordered exam by an expert chosen by the prosecution when the defendant intends to offer a "battered woman's syndrome" defense at trial through the expertise of a psychologist who interviewed defendant. (*State v. Briand, supra*, 130 N.H. at 651.) But when the discovery thereby generated should be disclosed to the prosecution was not an issue in *Briand*. (*Id.*, at 652-658.) Nor was it an issue in a similar case in Ohio, wherein the defense initially "declared that an independent examination by a state psychiatrist would be acceptable" if it meant excusing the defense's tardiness on complying with reciprocal discovery rules, after which the trial court granted the prosecution's request. (*State v. Manning* (Ohio App.1991) 74 Ohio App.3d 19, 24, 598 N.E.2d 25 [defense counsel objected only after the court granted the prosecution request for examination].) The cited Ohio rule (R.C. §

2945.371) requiring expert reports to be turned over to both parties applies only to incompetency and insanity proceedings, neither of which is an issue in the case at bench. The same holds true for the two cited Washington State rules. (RCW 10.77.060 and 10.77.065.) But a Washington state defendant pleading insanity still has a statutory right against self-incrimination (RCW 10.77.020(3)) to refuse to answer questions that he believes may incriminate him. (*State v. Carneh* (Wash.2004) 153 Wash.2d 274, 286 [state statutory right extends beyond the Fifth Amendment right].)

The New York rule (CPL § 250.10) permitting pretrial exams for the prosecution has not been analyzed on the topics raised by this case. (See *Matter of Lee v. County Ct. of Erie County* (N.Y.1971) 27 N.Y.2d 432, 267 N.E.2d 452; *People v. Segal* (N.Y.1981) 54 N.Y.2d 58, 429 N.E.2d 107; *People v. Berk* (N.Y.1996) 88 N.Y.2d 257, 667 N.E.2d 308; and *People v. Cruickshank* (N.Y.App.1985) 484 N.Y.S.2d 328, 105 A.D.2d 325.)

The Pennsylvania case was not faced with the disclosure timing issue as the prosecution's request occurred after the defense case-in-chief had concluded. (*Commonwealth v. Morley* (Pa.1996) 545 Pa. 420, 422 ["At the conclusion of the defense's case-in-chief, defense counsel joined a prosecution request to permit the Commonwealth's psychiatric expert, Dr. Kenneth Kool ('Dr. Kool'), to examine appellant prior to his testifying as to her mental state."])

The Tennessee case was an insanity case and the court's denial of delayed disclosure of prosecution-requested exam records was not based on any analysis of the timing of defendant's Fifth Amendment waiver. (*State v. Martin, supra*, at 23, 25.)

(3) Foreign jurisdiction cases not on point

The foreign jurisdiction authorities cited by the prosecution do not inform us about the precise points raised by the case at bench. They are not helpful in resolving the present dispute. "It is axiomatic, of course, that

cases are not authority for propositions not considered." (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2.) One federal circuit court acknowledged this explicitly:

> The issue squarely presented by a government request to examine the defendant regarding his or her mental state at the time of the offense is whether the defendant waives the privilege against self-incrimination by giving notice of intent to introduce expert evidence on that subject. Criminal Rule 12.2 was not intended to resolve this constitutional issue, and we need not and do not decide the issue here.
> (*United States v. Davis, supra*, 93 F.3d, at 1295, fn. 8.)

II. WRIT REVIEW WAS PROPER

The Court of Appeal has extensively set forth reasons why writ review is proper in this case. (Court of Appeal opn. at 8-13.)

Suffice it to add only that this Court decided *Verdin* on writ review. (*Verdin v. Superior Court, supra*, 43 Cal.4th, at 1100.) *Verdin* was decided on a statutory basis. This case raises important constitutional issues.

Maldonado is exercising his Fifth Amendment right against self-incrimination. An appellate remedy could only address a violation of that right. Writ review is proper in order to afford him his constitutional guarantee.

CONCLUSION

Nemo tenetur seipsum accusare.[12]

DATED: December 8, 2010.

Respectfully submitted,

PAUL F. DeMEESTER
Attorney for Reynaldo Maldonado

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12 No one is bound to accuse himself.

RULE 8.520(C)(1) CERTIFICATION

I, Paul F. DeMeester, certify that this answer brief on the merits contains 13,848 words, and therefore does not exceed 14,000 words. I used a 13 point Times New Roman font.

In stating this, I am relying on the word count of the computer program used to prepare this petition.

I make this certification pursuant to the requirements of Cal. Rules of Ct., Rule 8.520, subd. (c)(1).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on the 8th day of December, 2010, at San Francisco, California.

_____

CERTIFICATE OF SERVICE

I, the undersigned, say that I am over eighteen years of age and not a party to the above action. My business address is 1227 Arguello Street, Redwood City, California 94063. On December 8, 2010, I served the attached ANSWER BRIEF ON THE MERITS on the persons indicated below, by placing a true copy thereof in a sealed envelope with first class postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

Mr. Eric Cyman, Deputy Clerk, Division Five
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 8th day of December, 2010, at San Francisco, California.

PAUL F. DeMEESTER