#63(L) 12/14/65

Second Supplement to Memorandum 65-77

Subject: Study No. 63(L) - Evidence Code

Attached (pink pages) is a letter from Judge Kaus concerning Section 411 and certain provisions of the Privileges Article of the Evidence Code. We suggest that this letter be considered in connection with the tentative recommendation we are drafting on the Evidence Code. It is important that you have the Evidence Code with Official Comments available at the meeting when we consider this supplement.

Section 411

Judge Kaus makes a comment concerning this section near the bottom of the second page of his letter. We have merely codified the substance of a previously existing statutory section in Section 411. Hence, we doubt that Section 411 will be given the construction that Judge Kaus indicates was mentioned during the discussions of the BAJI Committee. Moreover, we doubt that the BAJI Committee would adopt any such construction of the section in preparing revised jury instructions. Nevertheless, if the Commission believes that a revision of Section 411 is necessary, it could be accomplished by adding an additional sentence to Section 411 so that the section will read:

> 411. Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact. Nothing in this section prevents proof of a fact by proving or otherwise establishing another fact or group of facts from which a deduction of the fact to be proved may logically and reasonably be drawn.
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> Comment. The addition of the last sentence of Section 411 is a clarifying, nonsubstantive revision. The last sentence is based on language contained in Section 600(b).

We do not recommend this revision because we consider it unnecessary and fear that it might create more confusion than it would eliminate. Another alternative method of dealing with the problem would be to add the following sentence to Section 411:

> Nothing in this section prevents proving or otherwise establishing a fact by other than direct evidence.

Section 992 and 1012

See point 1 in the attached letter from Judge Kaus. In connection with this suggestion, refer to Section 1011 (defining "patient") and the Official Comments to Sections 1011 and 991.

Although Sections 992 and 1012 are not entirely clear, the Official Comments--especially the Comment to Section 991 which is incorporated in the Comment to Section 1011--make it fairly clear that a diagnosis is covered by the privilege. However, in order to make the matter clear on the face of the statute, we suggest the following revisions of Sections 992 and 1012:

> 992. As used in this article, "confidential communication between patient and physician" means information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes a diagnosis made and the advice given by the physician in the course of that relationship.
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> Comment. The explicit recognition of "a diagnosis" in the last clause of Section 992 is a clarifying, nonsubstantive revision. See the Comment to Section 991 which makes it clear that a diagnosis is included within the scope of the protection afforded by the physician-patient privilege.
>
> 1012. As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and

in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or examination or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose of the consultation or examination, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

Comment. The explicit recognition of "a diagnosis" in the last clause of Section 1012 is a clarifying, nonsubstantive revision. See the Comment to Section 991 which is incorporated in the Comment to Section 1011.

Section 1017

It seems that Judge Kaus has two reservations concerning this section and the Comment thereto:

(1) He is concerned with the last sentence of the Comment. He apparently fears that this sentence may convey the impression that Section 1017 makes the attorney-client privilege inapplicable in cases where it would otherwise be applicable. We do not believe that the section has this effect. First of all, the section itself provides that "there is no privilege under this article if . . . ." This, we believe, clearly limits the exception to a claim of the psychotherapist-patient privilege. The last sentence of the Comment, like the other Comments to various particular privileges, discusses the privilege provided in the particular article of the Evidence Code. Thus, there seems to be no need to say in the last sentence of the Comment to Section 1017 that the "privilege provided by this article is unavailable." Moreover, Section 952, and the Comment thereto, make it clear that the attorney-client privilege can provide protection to communications between psychotherapist and patient--even in cases where the psychotherapist-patient privilege would not provide protection. See Sections 912(d) and 954, and the Comments thereto, which also make this clear.

Since the privilege that would be involved is the attorney-client privilege, and since the Comments to the pertinent sections of that privilege are clear, we see no need to make any revision in the last sentence of the Comment to Section 1017. Nevertheless, if the revision of Section 1017 (suggested below) is approved by the Commission, the Commission should consider whether a statement should be made in the Comment to the revised section to the effect that the exception in Section 1017 applies only to the psychotherapist-patient privilege and that the attorney-client privilege may provide protection in cases where a private psychotherapist is consulted.

(2) Judge Kaus is also concerned that "if the comment to section 1017 is restricted to experts paid for by the state because a defendant cannot afford them, you would have a real constitutional problem." You will recall that the Commission considered a similar objection by Professor Van Alstyne when the Commission was considering the Evidence Code prior to the 1965 legislative session. Professor Van Alstyne stated at the time that he was attempting to obtain a ruling from the California Supreme Court that the previously existing law (which we have codified in substance) created an unconstitutional discrimination between a defendant who has the means to employ his own private psychiatrist and a defendant who must use a court appointed psychiatrist because he does not have the means to employ a private psychiatrist. In this regard, consider the following extract from the Minutes of the January 1965 Meeting:

> The Attorney General objected to the application of the psychotherapist privilege to situations where psychiatrists are appointed by the court and the accused does not place his mental condition in issue.

The Commission rejected the Attorney General's objection, but the fact that the objection was made indicates that at least some law enforcement

representatives were not satisfied with having any privilege at all in the case of a court appointed psychiatrist. The Commission also rejected Professor Van Alstyne's objection.

The California Supreme Court has considered and rejected Professor Van Alstyne's objection. See Exhibit II (yellow) and Exhibit III (green). These exhibits present portions of the opinions in two decisions in Professor Van Alstyne's case.

Although not mentioned by Judge Kaus nor specifically suggested by the two court opinions attached, we suggest the following revision of Section 1017:

> 1017. There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his mental or emotional condition.
>
> Comment. The words "or withdraw" are added to this section to make clear that the psychotherapist-patient privilege applies in a case where the defendant in a criminal proceeding enters a plea based on insanity, then submits to an examination by a court-appointed psychotherapist, and withdraws the plea based on insanity prior to the trial on that issue. In such case, since the defendant does not tender an issue based on his mental or emotional condition at the trial, the privilege should remain applicable. Of course, if the defendant determines to go to trial on the plea based on insanity, the psychotherapist-patient privilege will not be applicable. See Section 1016.
>
> It should be noted that violation of the constitutional right to counsel may require the exclusion of evidence that is not privileged under this article; and, even in cases where this constitutional right is not violated, the protection that this right affords may require certain procedural safeguards in the examination procedure and a limiting instruction if the psychotherapist's testimony is admitted. See In re Spencer, Cal.2d , 46 Cal. Rptr. 753, P.2d (1965).
>
> It is important to recognize that the attorney-client privilege may provide protection in some cases where an exception to the psychotherapist-patient privilege is applicable. See Section 952 and the Comment thereto. See also Sections 912(d) and 954 and the Comments thereto.

You will note that we suggest that the limitations set out in In re Spencer not be included in the statute. We believe that it is sufficient to note in the Comment that these limitations exist. We make this suggestion because we believe that an attempt to codify In re Spencer would be a difficult, if not impossible, undertaking in view of the continuing development of the constitutional concept of right to counsel.

Respectfully submitted,

John H. DeMoully
Executive Secretary

District Court of Appeal
State of California
State Building, Los Angeles

Otto M. Kaus
Justice

December 10, 1965

John H. DeMoully
Executive Secretary
California Law Revision
Commission,
Room 30, Crothers Hall
Stanford University,
Stanford, California 94305

Dear John:

Dick Keatinge told me that you are having a meeting on December 17 and suggested that I submit the following suggestions to the Commission for its consideration. These are matters that arise out of a study of the physiotherapists privilege which I made for a panel discussion last week, which Dick attended:

1. Assuming that it was intended to keep the therapist's diagnosis privileged, would it be worth while to make this plain by an amendment to section 1012? (Section 992 suffers from the same defect.) Although the comment to section 992 makes it quite plain that the diagnosis is privileged, I am not so sure that it is justified by the language of the section.

2. This is a matter which I think I discussed with you on the telephone several months ago: The last sentence of the comment to section 1017 suggests that if a physiotherapist is appointed by court order (Pen. Code, § 987a; In re Ochse, 38 Cal. 2d 230,), gives an unsatisfactory report, but the defendant persists in presenting a defense based on his mental or emotional condition, the testimony of that particular physiotherapist is not privileged. The sentence may even have a larger implication and suggest that testimony of a privately hired physiotherapist is not privileged under those circumstances. This would be extremely strange in

District Court of Appeal
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Otto M. Kaus
Justice

December 10, 1963

John H. DeMoully
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view of the total approval to the doctrine of City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, recognized by sections 912 (d) and 954 and the comments thereto. If the comment to section 1017 is restricted to experts paid for by the state because a defendant cannot afford them, you would have a real constitutional problem. It should be noted, of course, that if the interview with the psychiatrist is not privileged, then it is not privileged at any phase of the trial, except to the extent that In re Spencer, 63 A.C. 418 and the implications from that case are applicable.

My last problem has nothing to do with the physiotherapist privilege, but was raised by the discussions of the BAJI Committee, of which I am a member: Many people infer from section 411 that circumstantial evidence of one witness is not sufficient to prove a fact. I am sure the inference is unintended.

Judge Richards, the consultant to the BAJI Committee has asked me to remind you that we are completely at sea what, if anything, was the Law Revision Commission's intention on how to handle res ipsa loquitur.

Have a nice meeting.

Sincerely,

Otto

OMK/gvf

EXHIBIT II

EXTRACT FROM PEOPLE V. SPENCER, 31 Cal. Rprt. 782 (1963) (Rehearing denied)

[14, 15] Defendant attacks on still another ground the admissibility of quoted testimony (ante, fn. 10) of Dr. George W. Abe relating to statements made by defendant in the course of the psychiatric examination on his plea of not guilty by reason of insanity. Defendant contends that it was error to allow Dr. Abe to so testify on the guilt phase, in view of the fact that defendant had withdrawn his insanity plea at the start of trial. Defendant argues that the admission of such testimony "tends to vitiate" the purpose of Penal Code section 1027 (post, fn. 12) in that "the possibility of a free and candid interview with the alienist is impaired" if the defendant knows that his statements in that interview may be introduced on the guilt phase of the subsequent trial;[11] secondly, defendant argues that the admission of this testimony violates his privilege against self-incrimination. Each of these arguments, however, has been recently considered and rejected by this court (People v. Ditson (1962) 57 Cal.2d 415, 447 [23a]–448 [23b], 20 Cal.Rptr. 165, 369 P.2d 714; People v. Combes (1961) 56 Cal.2d 135, 149 [17]–150 [20], 14 Cal.Rptr. 4, 363 P.2d 4) and no persuasive reason is suggested for disturbing the conclusions there reached. Thirdly, defendant advances the argument that the admission of such testimony "would tend to create an invidious discrimination against indigents solely because of their poverty" and hence violates the Equal Protection Clause (citing such cases as Griffin v. Illinois (1956) 351 U.S. 12, 16, 76 S.Ct. 585, 100 L.Ed. 891, and Douglas v. California (1963) 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811). Defendant points out that admissions of an accused to a physician privately employed by his counsel for the purpose of examining him in preparation for trial are held to be protected by the attorney-client privilege (Jones v. Superior Court (1962) 58 Cal.2d 56, 60-61 [8], 22 Cal.Rptr. 879, 372 P.2d 919); on this basis defendant argues that he was denied "equal protection" because he had insufficient funds to hire such a physician of his own and hence take advantage of that protection. But by its terms section 1027 operates in the same manner whether the defendant be rich or poor, because in either event it compels the use of *court-appointed* alienists when a plea of not guilty by reason of insanity is entered.[12] Obviously, the statute seeks the relevant truth—and makes it equally available—as to rich and poor alike. Defendant attempts to overcome this flaw in his position by further proposing that "Had defendant been a man of wealth and means, he *would have presumably* not entered a plea of insanity at all; for his privately employed psychiatrist *would already, presumably,* have reported to employed counsel that there was no basis for such a plea." (Italics added.) Whether counsel might nevertheless, in the proper exercise of the discretion which evolves from his responsibility, have felt it advisable to enter, and further explore the tenability of, such a plea would still appear conjectural. We take judicial notice of the fact that the plea of not guilty by reason of insanity has been more often entered than sustained. An established practice of the trial courts such as here challenged, grounded on an enactment of the Legislature and sanctioned by our decisions, will not be struck down on rank speculation alone. (Cf. In re Cregler (1961) 56 Cal.2d 308, 313 [6], 14 Cal.Rptr. 289, 363 P.2d 305.) Defendant's argument, in essence, amounts to no more than an unwarranted criticism of the manner in which his trial counsel conducted this aspect of the defense.

11. There is no showing in the record that defendant knew that his statements might be thus used.

12. Section 1027 of the Penal Code provides in relevant part: "When a defendant pleads not guilty by reason of insanity *the court must select and appoint* two alienists, at least one of whom must be from the medical staffs of the state hospitals, * * * to examine the defendant and investigate his sanity. *It is the duty of the alienists so selected and appointed* to examine the defendant and investigate his sanity, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question." (Italics added.)

EXHIBIT III

EXTRACT FROM IN RE SPENCER, 46 Cal. Rptr. 753 (Oct. 1965)

TOBRINER, Justice.

We adjudicate petitioner's application for a writ of habeas corpus which arises from his conviction of first degree murder and armed robbery. The jury fixed the penalty at death. We affirmed the judgment. (People v. Spencer (1963) 60 Cal.2d 64, 31 Cal.Rptr. 782, 383 P.2d 134, cert. den., 377 U.S. 1007, 84 S.Ct. 1924, 12 L.Ed.2d 1055 (1964).)

We set forth the bases for our conclusion that the admission of defendant's statements to the police in contravention of his constitutional right to counsel did not cause sufficient prejudice to require reversal. We also give our reasons for deciding that, since in the instant case the court-appointed psychiatrist testified at the guilt trial as to defendant's incriminating statements, defendant suffered the deprivation of a constitutional right to the presence of counsel during the psychiatric examination. Such testimony, however, alone or combined with other erroneously admitted evidence, did not prejudice defendant.

We explain that the presence of counsel at the psychiatric examination is not constitutionally required so long as the court does not permit the psychiatrist to testify at the guilt trial. If, however, defendant at such trial specifically places his mental condition into issue, the psychiatrist's testimony is admissible, provided that the court renders a limiting instruction that the jury should not regard the testimony as evidence of the truth of defendant's statements so related by the psychiatrist.

Moreover, we point out that Griffin v. State of California (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, which invalidated the California comment rule, does not apply to the instant case because, under our decisions, Griffin cannot be invoked here on collateral attack. In view of the commission of errors condemned in People v. Morse (1964) 60 Cal.2d 631, 36 Cal.Rptr. 201, 388 P.2d 33, we reverse the judgment as to the penalty trial.

(2) *The testimony of the court-appointed psychiatrist at the guilt trial.*

(a) *The right to equal protection of the laws and to protection against self-incrimination.*

[9] We do not accept petitioner's contention that the testimony of the court-appointed psychiatrist at the guilt trial,[6] which incorporated petitioner's incriminating statements, resulted in a deprivation of his constitutional rights to the equal protection of the law and to protection against self-incrimination.

The admission of the testimony of the court-appointed psychiatrist at the guilt phase of the trial did not violate the equal protection clause of the Fourteenth Amend-

6. Section 1026 of the Penal Code provides that if a criminal defendant pleads not guilty by reason of insanity and also enters other pleas, he shall first be tried on the other pleas and presumed sane at the trial. If he is found guilty, the issue of sanity is then tried before the same jury or a new one. "This separation of a criminal case involving the defense of insanity into two parts has produced in California a system that is popularly designated the 'bifurcated trial.'" (Louisell and Hazard, Insanity as a Defense: The Bifurcated Trial (1961) 49 Cal.L.Rev. 805.)

cent. Petitioner asserts that if he had been financially able to afford the services of a private psychiatrist he could have preliminarily determined the advisability of a plea of insanity and at the same time prevented, pursuant to the lawyer-client privilege, the disclosure of any of his statements to the psychiatrist. (In re Ochse (1961) 38 Cal.2d 230, 238 P.2d 561.) We disposed of this contention on appeal. (People v. Spencer, supra, 60 Cal.2d 64, 83, 31 Cal.Rptr. 782, 383 P.2d 134.) Petitioner presents no authorities subsequent to our decision compelling a different result. (But see People v. Spencer, supra, 377 U.S. 1007, 84 S.Ct. 1924, 12 L.Ed.2d 1055 [Goldberg, J., *dissenting* to the denial of the petition for certiorari].) [7]

We also held on appeal that the testimony of the court-appointed psychiatrist did not deprive petitioner of his constitutional protection against self-incrimination, basing our ruling upon the cases of People v. Ditson (1962) 57 Cal.2d 415, 447, 20 Cal.Rptr. 165, 369 P.2d 714, and People v. Combes (1961) 56 Cal.2d 135, 149, 14 Cal.Rptr. 4, 363 P.2d 4. Petitioner now argues that we must reexamine these cases in view of the holding in Malloy v. Hogan (1964) 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, to the effect that the Fifth Amendment privilege against self-incrimination applies to the states through the due process clause of the Fourteenth Amendment and that they must follow and apply federal standards. 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. (See Note (1962) 8 Utah L.Rev. 141; cf. Note (1962) 51 Geo.L.J. 143; Jones v. United States (1961) 111 U.S.App.D.C. 276, 296 F.2d 398, 405; Fouquette v. Bernard (1954) 9 Cir., 198 F.2d 860; United States ex rel. Davense v. Hohn (1952) 198 F.2d 934, 937, but cf. Killough v. United States (1964) 119 U.S.App.D.C. 10, 336 F.2d 929, 932.)[8]

Our previous decisions on this issue rested upon the California constitutional provision protecting against self-incrimination. (Cal. Const. art. I, § 13.) Without the comment rule, recently held to be unconstitutional (Griffin v. State of California (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106), the constitutional provision of this state is practically identical to the Fifth Amendment of the United States Constitution.[9] In the absence of a United States Supreme Court decision or a significant body of federal law compelling a contrary result, we do not believe that we must overrule our recent cases.

(b) *The right to counsel.*

We point out that petitioner suffered a violation of his right to counsel in that the court-appointed psychiatrist disclosed at the guilt trial statements uttered by petitioner at the psychiatric examination. Such disclosure did not, however, cause prejudice to petitioner that requires reversal. We like-

7. A recently enacted statute, effective January 1, 1967, makes privileged the communications between a defendant and a psychotherapist appointed by order of the court upon request of defendant's lawyer "in order to provide the lawyer with information needed so that he may advise defendant whether to enter a plea based on insanity or to present a defense based on his mental or emotional condition." (Cal.Evid.Code, § 1017; see Cal.Law Revision Com., Recommendation Proposing an Evidence Code (1965) 197.)

8. Title 18, U.S.C., section 4244, provides that "No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section [examination to determine if the accused is competent to stand trial], whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding." (See Edmonds v. United States (1959) 104 U.S.App.D.C. 144, 260 F.2d 474; Winn v. United States (1959) 106 U.S.App.D.C. 133, 270 F.2d 326.)

9. "No person shall * * * be compelled, in any criminal case, to be a witness against himself * * *." (Cal.Const., art. I, § 13.) "No person * * * shall be compelled in any criminal case to be a witness against himself * * *." (U.S.Const., Amend. V.)

wise explain certain limitations upon a defendant's right to counsel with respect to the psychiatric examination.

[10] In Massiah v. United States, supra, 377 U.S. 201, 206, 84 S.Ct. 1199, 1203, 12 L.Ed.2d 246, the United States Supreme Court held that "the petitioner was denied the basic protections of that guarantee [of counsel] when there was used against him at his trial evidence of his incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." Although the court-appointed psychiatrist, an agent of the court, does not necessarily seek to elicit incriminating statements for use by the prosecution as did the agent in Massiah, he does question a defendant about the facts of the crime, and any incriminating statements of a defendant so procured may be utilized by the prosecution at the guilt trial.

[11] The fact that the purpose of the psychiatric interview is not to gather evidence for the prosecution serves to compound the unfairness of the psychiatrist's testimony; an agent of the court in reality lulls a defendant into making incriminating statements that may be used against him at the guilt trial. (Cf. Leyra v. Denno (1954) 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948; Diamond & Louisell, The Psychiatrist as an Expert Witness: Some Ruminations and Speculations (1965) 63 Mich.L.Rev. 1335, 1349.) The psychiatric examination occurs during a "'critical period of the proceedings'" (Massiah v. United States, supra, 377 U.S. 201, 205, 84 S.Ct. 1199, 12 L.Ed.2d 246); if defendant's statements to the psychiatrist may be introduced at the guilt trial, defendant's need of counsel is as acute during the psychiatric interview as during the police interrogation. Accordingly, we hold that if the court-appointed psychiatrist's testimony as to petitioner's incriminating statements was to be admissible, petitioner was entitled to the presence of counsel during the psychiatric examination.

Although petitioner's counsel could have informed him of his right to refuse to speak at all to the court-appointed psychiatrist (People v. French (1939) 12 Cal.2d 720, 87 P.2d 1014; see People v. Bickley (1962) 57 Cal.2d 788, 792, 22 Cal.Rptr. 340, 372 P.2d 100; People v. Strong (1931) 114 Cal.App. 522, 300 P. 84), the right to the presence of counsel during psychiatric interviews had not then been established. (See People v. Stewart, supra, 62 A.C. 597, 607, 43 Cal.Rptr. 201, 400 P.2d 97; Note (1962) 51 Geo.L.J. 143, 161–162.) Thus petitioner could not have knowingly and intelligently waived his right to the presence of counsel during the interview. (Ibid.; see People v. Dorado, supra, 62 A.C. 350, 42 Cal.Rptr. 169, 398 P.2d 361.) Consequently, the court should not have admitted at the guilt phase of the trial the testimony of the psychiatrist.

[12] The erroneous admission of the court-appointed psychiatrist's testimony, however, did not sufficiently prejudice defendant so as to compel a reversal. The psychiatrist testified that petitioner stated that he had never known a person named Reyes at Folsom and had never met a person named Reyes. This statement conflicts with petitioner's earlier statement to the police that his companion, a man named "Reyes" or "Ramos" or "Rejos," whom he had known at Folsom Prison, had shot the cab driver. But witnesses had testified that they did not see anyone except the petitioner leave the cab after the shooting. Moreover, the police "directed a letter to the Department of Corrections in an effort to track down 'Ramos' (or 'Reyes' or 'Rejos'), but [were] unable to accomplish any related additional investigation on the basis of the department's response." (60 Cal.2d at p. 73, 31 Cal.Rptr. at p. 788, 383 P.2d at p. 140.)

Based upon the evidence as outlined above, we cannot perceive how the psychiatrist's testimony, alone or combined with the other erroneously admitted evidence, could have affected the verdict of guilt. Thus the erroneous admission of that testimony did not result in a "miscarriage of justice" (see Fahy v. State of Connecticut

(1963) 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed. 2d 171; Cal.Const. art. VI, § 4½) requiring reversal.

Although we have held that the court-appointed psychiatrist's testimony as to petitioner's incriminating statements should not have been admitted at the guilt trial because petitioner had been deprived of his constitutional right to the presence of counsel during the psychiatric examination, we recognize that such presence may largely negate the value of the examination. Surely the presence and participation of counsel would hinder the establishment of the rapport that is so necessary in a psychiatric examination. (Durst v. Superior Court (1963) 222 Cal.App.2d 447, 452-454, 35 Cal.Rptr. 143; State of New Jersey v. Whitlow (1965) 45 N.J. 13, 210 A.2d 763.) As Judge Bazelon has said, "The basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject." (Rollerson v. United States (1964) 119 U.S.App. D.C. 400, 343 F.2d 269, 274; see Krash, The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia (1961) 70 Yale L.J. 905, 918.) The attendance of counsel at the interview might thus frustrate the legislative goal of obtaining the evaluation of defendant's mental state by an impartial expert in the event of an insanity plea. (Pen.Code, § 1027.)

Recognizing the force of the above factors, as well as the constitutional rights of the defendant, we point out that the presence of counsel at the psychiatric examination is not constitutionally required so long as certain safeguards are afforded to defendant. To the described extent we thereby preserve the effectiveness of the psychiatric examination.

[13-15] Before submitting to an examination by court-appointed psychiatrists, a defendant must be represented by counsel or intelligently and knowingly have waived that right. Defendant's counsel must be informed as to the appointment of such psychiatrists. (See People v. Price (1965) 63 A.C. ---, 46 Cal.Rptr. 775, --- P.2d ---.) If, after submitting to an examination, a defendant does not specifically place his mental condition into issue at the guilt trial, then the court-appointed psychiatrist should not be permitted to testify at the guilt trial. If defendant does specifically place his mental condition into issue at the guilt trial, then the court-appointed psychiatrist should be permitted to testify at the guilt trial, but the court should instruct the jurors that the psychiatrist's testimony as to defendant's incriminating statements should not be regarded as proof of the truth of the facts disclosed by such statements and that such evidence may be considered only for the limited purpose of showing the information upon which the psychiatrist based his opinion.[10]

[16-19] In view of these rules, once a defendant, under the advice of counsel, submits to an examination by court-appointed psychiatrists, he is not constitutionally entitled to the presence of his counsel at the examination. If the defendant does not specifically place his mental condition into issue at the guilt trial, the exclusion of counsel at the examination cannot affect the guilt trial since the psychiatrist may not testify at that trial. If defendant does specifically place his mental condition into issue at the guilt trial, he can offer no valid complaint as to the testimony of the psychiatrist at that trial. After voluntarily submitting to the examination, defendant cannot properly preclude expert testimony on a subject that he has himself injected into

10. In alluding to defendant's specifically placing his mental condition into issue, we do not refer merely to defendant's plea of not guilty. We allude to the proffer at the guilt trial of such defenses as "diminished capacity" or epilepsy. In such event the court-appointed psychiatrist may testify at the guilt trial as to defendant's statements given at the psychiatric examination. If defendant does not offer evidence of his mental condition at the penalty trial, the court-appointed psychiatrist may not, of course, testify at that trial.

the trial. Moreover, the limiting instruction furnishes further protection. Thus, whether or not defendant places his mental condition into issue at the guilt trial, the above safeguards are sufficient to justify the exclusion of counsel from the psychiatric examination and at the same time avoid a deprivation of defendant's constitutional rights.

[20, 21] Although, with these protections, a defendant is not entitled to counsel at the psychiatric examinations, the court may in its discretion authorize defense counsel to be present as an observer, not as a participant. Such authorization would depend on the attitude of the psychiatrists involved. As the Supreme Court of New Jersey has said, "If in their [court-appointed psychiatrists'] view the presence of such a non professional would hinder or operate to reduce the effectiveness of their examination, or if they assert they cannot examine in his presence, the court may in the exercise of its discretion exclude counsel from the examination." (State of New Jersey v. Whitlow, supra, 45 N.J. 13, 210 A.2d 763.) Moreover, the court, upon request, may allow a defense psychiatrist to be present during the examination by a court-appointed psychiatrist.

Under this formulation, a defendant's constitutional rights are amply protected, while the court, the prosecution, and the defendant will obtain the benefit of the testimony of an impartial psychiatrist as to defendant's mental condition.